



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

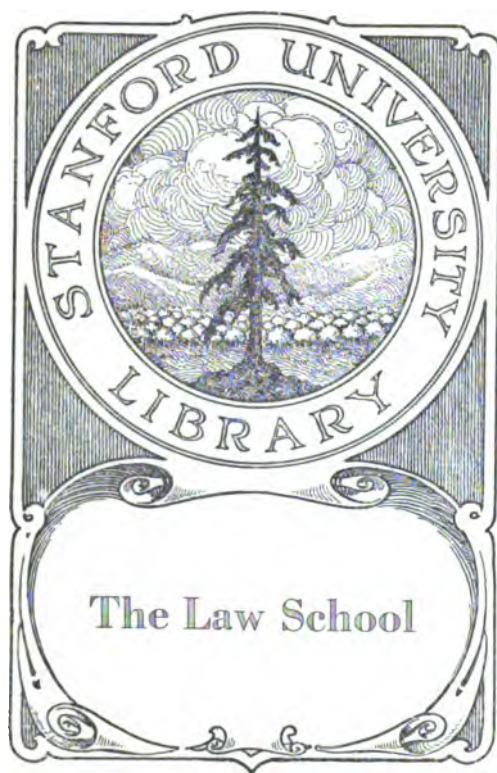
Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>





THE
NEW-YORK LEGAL OBSERVER,

CONTAINING

REPORTS OF CASES

DECIDED IN

THE COURTS OF EQUITY AND COMMON LAW,

AND

IMPORTANT DECISIONS IN THE ENGLISH COURTS ;

STANFORD ^{ALSO,} LIBRARY

ARTICLES ON LEGAL SUBJECTS,

PRACTICAL POINTS OF GENERAL INTEREST, REMARKABLE TRIALS,

SKETCHES OF THE BENCH AND THE BAR, ANECDOTES, &c., &c.

WITH

A TABLE OF CASES, A GENERAL INDEX,

AND

A DIGEST OF THE REPORTS.

EDITED BY

SAMUEL OWEN,

OF THE NEW-YORK BAR.

VOL. VII.

NEW-YORK:

SAMUEL OWEN, 75 NASSAU-STREET.

1849.

YVA 981.1 09071212

324428

A
TABLE
OF
CASES REPORTED
IN THIS VOLUME.

A.			Goldsmith against Marpe, - - -	351
Albert, Prince, v. Strange, - - -	228		Gall v. Lindsey, - - -	355
Amoskeag Manufacturing Co. against J. S. and R., - - -	301	H.		
Arnold and o'rs v. Gilbert and o'rs, - -	209	Hall v. Parker, - - -		138
Attorney General, The, v. Wilshire, -	323	Halstead v. The Mayor, &c., of New- York, - - -		74
B.		Hamilton and Deansville Plank-Road Co. v. Rice, - - -		139
Bank of Ithaca v. Bean and o'rs, - - -	225	Hammersley v. Hammersley and o'rs, -		127
Beard v. Egerton, - - -	326	Hardingham v. Allen, - - -		31
Belt, an alleged fugitive from justice, in the matter of, - - -	80	Hatfield v. Bushnell, - - -		331
Benson v. Chapman, - - -	321	Hews v. Hollister, - - -		11
Blossom against Adams, - - -	314	Hoxie against Cushman, - - -		149
Boosey v. Davison, - - -	231	Hunter, Survivor, &c., of Hunter, against Frisbee, - - -		319
Boosey v. Purday, - - -	356	Hutchison et al. ada. Clark, - - -		91
Brewster v. Striker, - - -	140	Hyer and others v. The Wave, - - -		96
Bridson v. Beneke and o'rs, - - -	322	I.		
Bronson and o'rs v. St. Peter's Church, Auburn, - - -	361	Isham, Rec'r, &c., against Williamson and an'r, - - -		340
Brophy v. Rodgers, - - -	152	J.		
Brown v. Chapman, - - -	93	Jones, respondent, v. Kipp, appellant, -		91
Brown v. Andrew, - - -	197	K.		
C.		Ketchum v. Williams, - - -		181
Caunt v. Thompson, - - -	291	Keymer v. Laurie and others, - - -		353
Cayuga County Bank v. Warden and an'r, -	114	L.		
Clayton et al. v. Wendell et al., - - -	77	Lievesey v. Lievesey, - - -		260
Coles v. Bullman, - - -	165	Lucas v. James, - - -		196
Crossfield v. Morison, - - -	199	M.		
Cherry v. Henning and Needham, - - -	359	McCormick v. Graves, - - -		45
D.		McCormick v. Kehoe, - - -		184
Dole, in error, v. Gold, in error, - - -	247	McManus v. Reginam, - - -		258
E.		Manning v. Dayton and o'rs, - - -		21
Englishbee v. Helmuth and an'r, - - -	186	May v. Skye, - - -		195
Elliot v. Thompson, - - -	369	Mier v. Cartledge and an'r, - - -		371
F.		Murray v. Hall, - - -		232
Finnerty v. Barker, - - -	316	Murray v. Mann, - - -		62
Fish v. Kimpton, - - -	232	Marshall and o'rs v. Bazin, - - -		342
Ford v. Babcock, - - -	270	Mills v. The Guardians of the Alderbury Union, - - -		355
Francis v. Webb, - - -	199	N.		
Fuller v. Emeric, - - -	300	Naugatuck Transportation Co. v. Steam- boat Rhode Island, - - -		38
Forth v. Simpson, - - -	353			
G.				
Gardner v. Slade, - - -	376			
Gordon v. Hope, - - -	323			

TABLE OF CASES.

O.			Smith v. Capon,	-	375
O'Brien v. Reginam,	-	258	Smith v. Oliphant and o'rs,	-	17
Odell v. Steamboat Washington Irving,	-	4	Smith v. Thompson,	-	327
Onyon v. Washbourn,	-	229	Snowhill and o'rs <i>ads. Knapp et al.</i> ,	-	15
P.			Stephens <i>et al.</i> v. Browning and an'r,	-	61
People, The, v. Martin,	-	49	Stokes and o'rs v. Hagar,	-	16
_____ v. Austin,	-	117	Syme v. Ward, <i>Survivor of Goadby</i> ,	-	10
_____ on complaint of Clayton v.			T.		
Wolven and an'r,	-	89	Truax, <i>respondent</i> , v. Clute, <i>appellant</i> ,	-	163
Place, Nelson, in the matter of account-	-	217	Tucker v. Rushton,	-	215
ing of,	-		Turner v. Comstock,	-	23
R.			Turrill v. Crawley,	-	230
Regina v. Wood,	-	291	Town, assignee of, v. Bullus,	-	345
Richards v. London, &c., Coast Railway	-	325	U.		
Co.,	-	29	United States, The, v. The Brig Lawrence,	-	174
Ringham v. Clements,	-	374	V.		
Rowley and o'rs v. Adams and o'rs,	-	7	Vanderpool, Jr., against Tarbox and an'r,	-	150
Ruckman, <i>in error</i> , v. Cowell, <i>in error</i> ,	-	332	Vandervoort, ex'r of Vandervoort, in the	-	25
Randall v. Parker,	-	354	matter of,	-	358
Rambalon v. Whalley,	-		Virtue v. Painter,	-	
S.			W.		
Sainter v. Ferguson,	-	198	Welsh, Mary, in the matter of proving	-	153
Seaman, in the matter of,	-	70	the will of,	-	323
Shaw v. The North and North Midland	-	324	Wilshere v. Harwood,	-	286
Railway,	-	57	Wilson, Rec'r, &c., v. Allen and o'rs,	-	357
Sheldon and o'rs v. Weeks and o'rs,	-	255	Wakley, Jun., v. Healey,	-	365
Sisson against Stevenson,	-	238	Woodward v. Harris and an'r,	-	
Skolfield v. Potter, <i>et al.</i> ,	-				

THE
New-York Legal Observer.

VOL. VII.]

NEW-YORK, JANUARY, 1849.

[MONTHLY PART.]

CHALLENGING JURORS.

OPINION OF JUDGE OGDEN EDWARDS UPON THE QUESTION, WHETHER
HAVING AN OPINION, OR EVEN EXPRESSING IT, THAT A PERSON
IS GUILTY, LEGALLY DISQUALIFIES FROM SERVING AS A JUROR.

ARTICLE I.

WHETHER the expression of an opinion as to the guilt or innocence of a prisoner, is a cause for *principal* challenge, is a question which of late has attracted much of the public attention and produced some diversity of opinion. Mr. Justice Woodworth, in delivering his opinion upon this question in the case of the *People v. Jacob Barker and others*, declared that "all the elementary writers, with the exception of Chitty, lay down the proposition *broadly*, that if a juror has declared his opinion beforehand, it is a good cause of challenge."

There are those, on the other hand, who deny that the position rests upon any tenable authority. Which is right and which is wrong, must necessarily be decided by the authorities themselves. Before I proceed to state them, I will premise that there are two kinds of challenges to jurors, the one is called *principal* and the other for *favor*.

PRINCIPAL challenges are for causes which the law presumes indicate bias, or for causes which prove evident *favor* or *enmity* in the juror. *Principal* challenges must always be decided by the court. Challenges for *favor* must be decided by *triers* appointed by the court, and *any* cause which in the exercise of a sound discretion, may induce them to suppose that a juror will not be impartial, or as it is expressed in the books, *indifferent* between the parties, will justify them in setting him aside. *Trials per pais*, 122, 8.

That jurors must be perfectly impartial, entirely indifferent, is a position which no lawyer ever controverted. The question is, *whether the expression of an opinion*, as to the merits of a case even by a person who disclaims all prejudice against a party, is in judgment of law in all cases a cause for disqualification from serving as a juror? If, so, it is cause for *principal* challenge. If not, it is not a cause for

principal challenge, but if a party wishes to make the objection, he must challenge the juror for *favor*; and then it must be submitted to the decision of *triers*, and if, under all circumstances, they find him *indifferent*, or in other words impartial, he will be admitted as a juror. The question, therefore, resolved into simples is, whether the court or triers must decide the question. If the court, then, upon the fact being established, the juror must be set aside. If the triers, then, after the establishment of the fact, they can look further and decide whether, under the peculiar circumstances of the case, the expression of an opinion to the contrary, notwithstanding, the juror is or is not indifferent or perfectly impartial; and as they find this fact, *pro* or *con*, they will admit him as a juror or set him aside.

The first of the elementary writers, who touches upon this subject, as far as I can discover, is Fitzherbert. He wrote in 1514, and his works, as is well remarked by Chancellor Kent, in his very able commentaries, "was for that period one of singular learning and utility." He lays down the law to be, that "If a juror says that he will pass for the plaintiff, this is not a cause for challenge, unless it should be found that he said this more for favor than for the truth of the matter." *Fitzherbert, Ab.* p. 202, fol. 37.

That the subject of challenges had been often and thoroughly considered and was well understood at this early day, is apparent from this work, which contains thirteen folio pages briefly put upon the subject.

Brooke, who wrote in 1573, says, "that if a juror has said twenty times that he would pass for one party from the knowledge he has of the matter and of the truth, he is *indifferent*; but if he said so from affection he has to the party, he is *favorable*." *Brooke, Abr.* p. 123, fol. 55.

Rolle, who was chief justice under the protectorate of Cromwell, the preface to whose work Sir Matthew Hale wrote, and who there speaks of him in the highest terms of commendation, winds up his eulogium with these words. "In short, he was a person of great learning and experience in the common law, profound judgment, singular prudence, great moderation, justice and integrity."

This great man has gone very extensively into this subject, and appears to have considered and collated every thing which the books then furnished. He lays down the law to be, "If a juror say that he will pass for the one party, this is good challenge for *favor*, if he said this in favor of him." 2 *Roll. Abr.* 7 H. b. 24. But if he did not say so in favor, but for the knowledge which he had of the thing in issue, this is not a good challenge for favor. *Ib.*

It is not a cause of challenge in a juror, that he said that he would pass for the one party, if it should not be found by the triers or the court, that he said this more from favor than from the truth of the matter. 2 *Roll. Abr.* 657. 20 H. b. 40. And in this all the court concurred.

If a juror promise one party to pass for him, this is not principal challenge, but for favor. 2 *Roll.* 655. 3 H. b. 38 b. So, if a juror

Challenging Jurors.

declare the right of one party, or say his verdict before hand, this is a principal challenge. 49 *E. 3 Ib.* 49. 1. But it seems this is to be intended that he said that he would pass for him. without regarding right. 1 *Roll.* 655.

If a juror said twenty times that he would pass for the one party, this is not principal challenge, for it may be that he thus spoke from the knowledge which he had of the thing in issue, and not from affection. 2 *Roll.* 655. 7 *H. b.* 25. 20 *H. b.* 40 *Curia.*

In *Trials per Pais*, p. 133, an ancient work, exclusively upon trials by jury, but one of so much learning and ability as to be a standard authority even at this day; it is laid down that, "If a juror says that he will pass for one party, because he knows the verity of the matter, this is no challenge: but if he says this for favor, it is a good challenge, if the *triers* find he spoke from *favor* and not from *truth*."

Sir Matthew Hale says, "That challenges to the poll *for cause*, are many as in other causes, which I shall not mention at large, because they are *all* gathered up by the Lord Coke, *supra*, *Lit.* p. 234; but shall mention such as more specially belong to capital causes." 2 *Hale's P. C.* 272.

As according to Hale, ALL the challenges to the poll *for cause*, (or principal challenges,) are gathered up by Lord Coke, it becomes necessary in order to ascertain the opinions of both of these great men upon this subject, to recur to the passages in Lord Coke thus referred to.

Upon recurring to Lord Coke, I find that the utmost length he goes in enumerating causes for *principal* challenges is to say, "That if a juror has given a verdict before in the same matter, or upon the same title or matter, though between other persons; or if he was the indictor of the plaintiff or defendant in the same cause; or if a juror hath been an arbitrator, chosen by the plaintiff or defendant in the same cause, and have been informed of or treated of the matters, this is a principal challenge, otherwise if he were never informed or treated thereof; and otherwise if he were indifferently chosen by either of the parties though he treated thereof." *Co. Litt.* p. 157 *b*, § 234. And even as it respects giving a verdict upon the same cause, (the most solemn way of giving an opinion,) he says, "But it is to be observed that I may speak once for all, he that maketh the challenge must show the record if he will have it take place as a *principal* challenge, otherwise he must conclude to favor." *Ib.*

Lord Coke, no where says, that the expression of an opinion is a cause for *principal* challenge. He goes fully into the examination of causes of principal challenge, and Sir Mathew Hale says, he has given *all* the causes for *principal* challenge. The conclusion then is a necessary one, that in Hale's opinion, the expression of an opinion was not a cause for principal challenge. If Lord Coke had been of opinion that a case of such frequent occurrence as the expression of an opinion was a cause for principal challenge, would he not have mentioned it; would he have gone on to say that giving an opinion as a *grand* or *petit juror* or *arbitrator*, would be a *cause* for principal

U. S. District Court.—Odell v. The Steamboat Washington Irving.

challenge; provided he was of opinion that giving an opinion in *any* case was?

To the authorities before quoted, I think may now be fairly super-added that of those two great oracles of the law.

Thus, then, as far as my researches have extended, and I have no doubt that I have quoted all of any authority who have touched upon the subject, all the standard authors upon the subject of the common law, hold one uniform language upon the subject; and certainly afford some ground for questioning the correctness of the position, that "*All the elementary writers, with the exception of Chitty, lay down the proposition broadly, that if a juror has declared his opinion beforehand, it is a good cause of challenge.*"

That the venerable sages of the law whom I have quoted, three of whom were Chief Justices of England, did not know what the law was upon a point which must frequently have happened, is not to be presumed.

In the next article, I will proceed to the consideration of the more modern authorities.

H. S. District Court.

(Southern District of New-York.)

Before the Honorable SAMUEL R. BETTS, District Judge.

IN ADMIRALTY.

JOSEPH ODELL, *Libellant*, v. THE STEAMBOAT WASHINGTON IRVING.—14 November, 1848.

COLLISION IN HELL-GATE.

Where a collision occurs during the day-time, between a vessel close hauled and a steamboat whose course lay across that of the close hauled, which had been in full view from the steamboat, at a sufficient distance to have enabled the steamboat to have avoided her:—

Held, that the steamboat was *prima facie* in fault.

The steamboat is bound to show some improper act or omission in the close hauled, causing the collision, or that presumption will exist against herself.

Such defence must be set forth clearly and must be proved as laid.

Where the proofs are essentially different from the allegations the defence fails.

A steamboat justified a particular course in reference to a vessel close hauled, on the ground that the close hauled would not pursue a course hazardous and disadvantageous, if not impracticable to herself, which was sustained.

But such a navigation will not be inferred against the close hauled vessel, but must be proved when set up, and if not proved, the presumption is, that the close hauled would take care of herself and navigate to the best advantage.

When the course of a vessel close hauled was towards the shore: *Held*, that she had *prima facie* the right to hold on to her tack as close to the shore as is deemed judicious by those navigating her, and a steamboat having her in full view, and with time to stop and back or room to steer out of the way, is bound to use her facilities so as to prevent a collision, and has no right to proceed on the supposition that she will have room to pass between the close hauled and the shore.

Where a steamboat misjudged the navigation of a vessel close hauled, and was herself navigated on the supposition that the other would go about before reaching the point where they would

U. S. District Court.—Odell v. The Steamboat Washington Irving.

meat, and the close hauled held on and a collision took place ; the steamboat was held bound to prove that the close hauled was misnavigated and should have gone about before ; failing which proof, she was adjudged liable for the damages.

THE circumstances appear in in the opinion of the court.

W. J. Haskett and *W. Q. Morton*, for libellant.

Leveridge, for steamboat.

BY THE COURT.—The collision upon which this action is founded, occurred in Hell-Gate, in the day-time. The libellant's schooner was sailing eastward on the flood tide into the Sound, and the steamboat was running to New-York, crowding close in by the shore of Ward's Island, in what was regarded an eddy of the tide. The wind was N. E., and the schooner on her starboard tack from the Pot Rock, across towards Negro Point, and in plain view of the steamboat. The starboard side of the schooner and bow of the steamer came in collision.

Under these circumstances it is manifestly incumbent on the steamer to show some improper act or omission on the part of the schooner causing the collision, or it must be presumed that the steamer neglected to use in due time the means at her command, and which the law requires her to exercise to avoid it.

The excuse must be set forth clearly in the answer, and must be proved as laid, in order to protect the claimants.

In comparing the pleadings and proofs on this point, they are not found to be in harmony, and the difference is essential in its character. The answer imputes the fault of the schooner to her holding the starboard tack into the eddy tide across the bows of the steamer, and insists it was her duty to have gone about, as there was not room for her to go between the steamer and the land, and by running into the eddy tide, command of her would be lost. The argument upon this assumption of the facts is cogent, that the steamer had no reason to expect the schooner would attempt a navigation hazardous to herself, if not impracticable, and was accordingly rightfully continued on the course which would be proper, in case the schooner was managed according to the usual and safe method of navigating under those circumstances.

There are two important particulars in this line of defence, not clearly made out by the proofs. First, that the steamer was actually in an eddy or slack tide at the time of the collision, and where for that cause, the schooner could not have been readily brought about on the other tack ; and second, that there was not space sufficient between the steamboat and the shore for the schooner to pass, if she chose to take that course.

The officers of the steamboat had a right to act upon the presumption that the schooner would not be intentionally run in dangerous proximity to the shore, or where she would disable or embarrass her-

U. S. District Court.—*Odell v. the Steamboat Washington Irving.*

self in coming about, from the loss or the change of the current in the track the steamboat was pursuing. But if these impediments were not palpable, the schooner must be left to her course, and the steamboat must regulate her proceedings accordingly, leaving it to the judgment of those managing the schooner to determine the advantage or prudence of continuing her tack out of the true tide, and even to very close proximity to the land.

The law would, under circumstances of uncertainty or doubt in respect to those particulars, impose on the steamboat the duty of taking timely precaution so as to leave it safe for the sailing vessel to exercise her own volition in the choice of the expedient to be adopted. The schooner being close hauled was entitled to run out her tack and to hold it so long as she judged it advantageous or prudent, and if there was any uncertainty on board the steamer as to its direction or continuance, there was ample time, by stopping and backing her engine, or changing her course into the river, to have left space to the schooner to work out the manœuvre as she might elect.

Upon the line of defence set up by the answer, there is clearly an inadequacy of evidence to establish a justification. The testimony produced on the defence has borne a tendency, if it is not in fact limited to that, to show that the accident was produced by the improper attempt of the schooner to come about on reaching the eddy tide. She is represented to have luffed up into the wind, so as to shake her sails, giving the steamboat to understand she was changing her tack, and which would naturally induce the steamboat to continue under way and on her course, when suddenly the schooner filled away and run in shore across the bows of the steamer, which had then approached so near as to be unable, by stopping and backing with all practicable despatch, to prevent the schooner being blown or drifted against her stern.

This line of defence is not within the answer: it is a most important deviation from it. The fault on this version of the case was in misleading the steamer by a false manœuvre of the schooner, and allowing her to advance on her tack until it was no longer in her power to go astern of the schooner or lie back out of her way, whilst she continued out her starboard tack, and come round with the wind on the other quarter. This defence supposes such would have been the duty and course of the steamer in the exercise of a nautical judgment upon the course of the schooner manifesting an intention to continue on her starboard tack.

The court is not at liberty to pass upon the sufficiency of the proofs to sustain this line of defence. It is out of the pleadings, and accordingly not available to the claimants, nor brought within the legal cognizance of the court.

Upon the pleadings and proofs pertinent to them, it was manifestly the duty of the steamer to leave a free track to the schooner to run out her starboard tack; and she fails to prove herself at a point up to which it would be unsafe or improper for the schooner to continue the course she was seen to be running.

Court of Appeals—Ruckman v. Cowell.

There can be no reason to suppose the officers of the steamer were actuated by any rash or improper motive in continuing her course. It was their interest, and unquestionably their desire and intention to avoid the schooner, and most certainly not to place themselves in her way. They, however, misjudged her purpose, and acted under a persuasion that she must go about before she could come up to the line they were running. They have failed to prove that it was necessary she should so have done, or even that it was not perfectly proper for her to continue her course to the place of collision. The law then, under the facts in proof, casts on them the responsibility of so conducting the steamer as to avoid meeting the schooner at that point, and charges them with the consequences following the collision. The decree must therefore be entered for the libellant condemning the steamboat in the damages sustained by the schooner from that collision.

It will be referred to a commissioner to ascertain and report those damages to the court.

Court of Appeals.

[State of New-York, November, 1848.]

ELISHA RUCKMAN, *Plaintiff in Error*, v. ROYAL COWELL, *Defendant in Error*.

(ERROR TO THE SUPREME COURT.)

In an action of *trespass de bonis*, where the defendant pleaded the general issue and gave notice of justification, and justified under a judgment and execution, and the plaintiff gave in evidence his discharge under the U. S. Bankrupt Act of 1841, obtained subsequent to the date of the judgment:—*Held*, the defendant might give in evidence that the plaintiff had been guilty of such acts of fraud as would by the bankrupt act avoid the discharge.

ACTION of *trespass de bonis*. The facts sufficiently appear in the opinion of the court.

S. Stevens, N. B. Blunt, Brown and Mathews, for plaintiff in error.

H. G. Wheaton, Doolittle and Hadley, for defendant in error.

BROWSON, J.—The case may be stated in few words. Cowell brought an action of *trespass de bonis asportatis*, against Ruckman in the Supreme Court. The defendant pleaded not guilty, and gave notice of justification under a judgment and execution in his favor against the plaintiff. On the trial, the plaintiff proved the taking of the goods by the sheriff of New-York upon an execution in favor of the defendant against the plaintiff, and then rested his cause. The defendant then gave in evidence the *feri facias*, under which the sheriff acted, and the judgment on which the execution issued. The judg-

Court of Appeals.—*Rickman v. Cowell*.

ment was recovered on the 8th day of February, 1841, upon two promissory notes made by the plaintiff in 1840. The plaintiff then offered in evidence his discharge as a voluntary bankrupt under the act of 1841, granted by the District Court of the United States for the Northern District of New-York, on the 25th day of July, 1842. The defendant objected to the admission of this evidence on several grounds: 1st. The evidence was immaterial, and if admitted would not subject the defendant to an action of trespass for taking the property. 2d. The plaintiff must show that the district court acquired jurisdiction to grant the discharge: and 3d. The act of Congress under which the discharge was granted, was unconstitutional and void. The court overruled all of these objections, and the discharge was given in evidence. It purported to have been granted on the petition of the bankrupt. The defendant then offered evidence to prove, that the plaintiff had been guilty of such acts of fraud as would, by the bankrupt act, avoid the discharge. This evidence was rejected by the court on the ground that the defendant had not given the plaintiff notice of the frauds which he proposed to prove. The defendant excepted to this and the other decisions of the court, and verdict and judgment having passed for the plaintiff, the defendant now brings error.

If the discharge was valid it extinguished the judgment, and the defendant was a trespasser for afterwards acting under it. As the execution was regular upon its face, and issued from a court of competent jurisdiction, it was a protection to the officer who made the levy; but it could not justify the party at whose instance it was issued. He acted at his peril. It is true that he may have been ignorant of the discharge, but that was his misfortune. Having seized the goods without authority, it was a trespass for which he must answer, however innocent he may have been of any intention to do an illegal act.

In pleading a bankrupt discharge, it has been held necessary to show that the Court had jurisdiction to grant it by averring the existence of the facts on which jurisdiction depended. *Sackett v. Andross*, 5 Hill, 327. *Stephen v. Ely*, 2 Id. 607. And see *Morgan v. Dyer*, 10 Johns. 161. *Jinks v. Stebbins*, 11 Id. 224. But when the discharge is given in evidence, jurisdiction to grant it should be presumed until the contrary appears. It would be otherwise if the discharge were granted by a commissioner or a court of strictly inferior jurisdiction. But the District and Circuit Courts of the United States, though of limited jurisdiction, are not inferior courts in the technical sense of the term. If jurisdiction do not appear upon the proceedings, their judgment and decrees will be reversed on error or appeal. But they are not nullities, which may be disregarded in a collateral proceeding. *McCormick v. Sullivan*, 10 Wheat. 192. In this respect the District and Circuit Courts of the United States stand on the same footing as courts of general jurisdiction, and the authority of such courts is always to be presumed until the contrary is shown. It is true that the Bankrupt Act does not in terms give any effect to the discharge, ex-

cept "when *duly* granted," (§ 4). But the law presumes that it was duly granted until the contrary appears.

The rejection of the evidence to impeach the discharge for fraud was, I think, clearly wrong. True, the 4th section of the Bankrupt Act says in effect, that the charge may be impeached for fraud on *prior reasonable notice*, specifying in writing such fraud. But that means no more than that notice shall be given when the case is such that the fraud may be pleaded, and not that the creditor must plead the fraud at his peril, where, as in this case, he had no opportunity to do it. If the debtor on being sued pleads his discharge, the creditor must reply the fraud or he will not be allowed to prove it on the trial. But that rule cannot apply where, as in this case, the discharge is given in evidence without having been pleaded, and consequently where the creditor could not plead the fraud. If there had been negative words in the statute, as, that the discharge should only be impeached when the fraud was pleaded, they would hardly be construed as applying to a case where the creditor had no opportunity to plead the fraud. But there are no negative words in the statute.

The same question may arise about giving the discharge in evidence in favor of the debtor. The 4th section provides that the discharge shall and may be *pleaded* as a full and complete bar to all suits. If the bankrupt when sued omits to plead the discharge, he cannot give it in evidence. But when the form of the pleadings is such as to afford him no opportunity of pleading the discharge, there can be no doubt that it may be given in evidence on the trial, without notice. It was so given in evidence in this case, though there was about as much ground for rejecting it as there was for rejecting the answering evidence which was offered by the creditor. There was, I think, no ground for rejecting either of them.

There are many cases in the law where a party must plead or give notice of the particular matter which he intends to prove on the trial, or he will be precluded from proving it; but so far as I can recollect the rule never applies where the party had no opportunity in the regular course of pleading of setting the matter up. I see no good reason why an exception should be made in this case.

I have considered the question as though the defendant knew of the discharge at the time of pleading. But there is no evidence of that fact, nor any sufficient ground for presuming it. It may well be that he never heard of the discharge until it was offered in evidence on the trial. The Bankrupt Law did not require personal service of notice upon creditors; and it often happened that they did not hear of the application until after the debtor was discharged. I well recollect that in several motions which were before the Supreme Court while I sat in it, the creditor made affidavit that he never heard of the proceedings in bankruptcy until the discharge was set up in answer to an action. It will be presumed for the purpose of upholding the discharge, that such notice was given, as the statute requires. *Norris v. Goss*, 2 Spear Law Rep. 80. But that is not actual notice, nor is the presumption to be indulged for any other purpose than that of

Court of Appeals.—Hewes v. Hollister.

209

giving effect to the discharge. There are many cases where the publication of a notice in a newspaper is made to supply the place of process to bring the party into Court, and such notice will be sufficient to uphold the proceedings. But it proves nothing against the party in relation to any other matter.

My opinion, that the voluntary branch of the Bankrupt Law, under which branch this discharge was obtained, is unconstitutional, has already been declared: *Sackett v. Andross*, 5 Hill, 327,* and time and reflection have only served to confirm me in that conclusion. But as this judgment must be reversed on another ground, it is not necessary the Court should pass upon that question on the present occasion.

I am of opinion that the judgment should be reversed, and a *venire de novo* be awarded.

Ordered accordingly.

JAMES SYME v. MATTHEIAS B. WARD, *survivor of William Goadby*.—
November, 1848.

PRACTICE.

It is irregular to serve an assignment of errors before one is filed, and a default entered on the service of an assignment before filing one, although more than eight days have expired since the filing and before the entry of the default, is a nullity.

A remittitur cannot regularly be sent to the court below until after the expiration of ten days from the reversal of the judgment although rendered by default.

This court has power on granting a motion in a suit commenced before the first of July, to allow to the prevailing party his costs to be taxed.

The statute authorizing the Supreme Court to make rules regulating the amount of costs on motion does not apply to this court.

So far as suits that existed in this court when the Code took effect are concerned, the provisions of the Code forbidding the allowing of costs on granting a motion, have no application to this court. *Supp. to Code*, § 2.

If the suit had been commenced since the first of July, the defendant in error would have been obliged to have borne the expense of getting rid of the irregular proceeding of his adversary.

WRIT of error by Syme, to remove a judgment against him in favor of Ward and Goadby in the New-York Common Pleas. The writ of error was returned and filed with the clerk of this court on the 30th of June last. On the same day, the plaintiff in error served an assignment of errors, with notice that the defendant Ward, who had survived Goadby, was required to join in error within eight days, or be precluded; but an assignment of errors was not filed until the next day, the first of July; on the 11th of July, the plaintiff in error entered an order precluding the defendant in error from joining in error. On the 13th of July, the plaintiff in error entered an order reversing the judgment of the court below with costs; and on the same day a remittitur was issued.

N. Hill, Jr., for the defendant in error, moved to set aside the

* See this case fully Reported, 3 New-York Legal Observer, p. 11.

Supreme Court.—*Hews v. Hollister.*

order precluding the defendant from joining in error, and all subsequent proceeding for irregularity.

S. Stevens, for the plaintiff in error.

BRONSON, J.—The plaintiff in error was irregular in serving an assignment of errors before one had been filed; (Rule IV.) and the orders precluding the defendant from joining in error and reversing the judgment were therefore unauthorized.

We are also of opinion that the remittitur should not have been sent to the court below, until the expiration of ten days from the reversal of the judgment. (Rule XX.)

As the defendant in error has been obliged to come here at considerable expense to get rid of an irregular proceeding, he ought to have costs on the motion if we have any authority to give them. The 270th section of the Code of procedure forbids the allowance of costs to the party who makes a motion. But originally that section did not apply to this suit, which was commenced before the first of July. *Code*, § 8, 391. And although it has since been applied to proceedings in such suits subsequent to the first of July, in certain specified courts, this court is not among the number, (*Supp. Code*, § 2.) We, therefore, have power to allow costs. The amount must be settled by taxation.

The statute authorizing the supreme court to make rules regulating the amount of costs on special motions, does not apply to this court. *Stat.* 1840, p. 333. 336, § 15. 39 *Stat.* 1847, p. 321, § 8. If the suit had been commenced since the first of July, the defendant in error would have been obliged to bear the expense of getting rid of the irregular proceedings of his adversary.

Motion granted with costs to be taxed.

N. Y. Supreme Court.

[*Munroe Gen. Term, September, 1848.*]

Before the Honorable JOHN MAYNARD, HENRY WELLS and SAMUEL L. SELDEN,
Justices.

SEWELL HEWS V. LUCIUS M. HOLLISTER.

Under the 9th Section of the act to prevent betting and gaming, 1 R. S. 662, persons privately interested in a bet, by previous contributions, when the bet is in fact made by another, cannot sue to recover the money back; such action lies only by the person actually making the bet.

THE facts of this case are sufficiently stated in the opinion of the court. The cause was argued at the Cayuga general term, in January, 1848.

Supreme Court.—*Hewes v. Hollister.*

John P. Hulbert and B. Davis Naxon, for plaintiff.

Stephen A. Goodwin, for defendant.

By the Court, SAMUEL L. SELDEN, Justice.—On the 2d of November, 1844, Elijah Miller and William H. Noble made a bet of \$500 upon the then ensuing Presidential election, Miller betting that Henry Clay, and Noble that James K. Polk would be elected. The terms of the bet were reduced to writing, and signed by the respective parties, who mutually deposited the amount of the bet with the defendant as stakeholder. After the election, to wit, on the 28th of December, 1844, the plaintiff caused a written notice to be served upon the defendant, signed and acknowledged by himself, stating that \$200 of the \$500, bet and deposited by Miller, belonged to him, plaintiff, and requiring the defendant to pay the sum to the bearer of the notice: which not having been done, this action was brought to recover the \$200, pursuant to the provisions of the statute concerning betting and gaming. The plaintiff having been nonsuited at the circuit, now moves on a bill of exceptions for a new trial. It was proved in the trial that the \$500 bet by Miller, and deposited with the defendant, was furnished by several persons, who contributed in different proportions to make up the sum; but it does not appear that this fact was disclosed at all to the defendant, or to Noble, at the time of making the bet.

The written memorandum which was introduced treats the bet as made by Miller alone, and the money as exclusively his. The plaintiff offered proof to show, that he furnished \$200 of the money bet by Miller, but whether under the evidence adduced, he is to be considered as an original contributor of the \$200, or as a subsequent purchaser into the purse, to that amount, is very doubtful. In the view, however, which I have taken of the case, it is immaterial how that question is settled.

The principal point to be considered is, whether the action should have been brought by Miller, who made the bet and deposited the money, or whether the defendant is liable in a separate suit to every person who may have contributed more or less to make up the entire sum bet. The action is founded on the 9th section of the act concerning betting and gaming, (1 R. S. 3d ed. p. 839,) which provides that, "Any person who shall pay, deliver or deposit any money," &c., may sue and recover. This language is very definite, and points out with great distinctness the party who may bring the action. Under the facts in this case, Miller who made the bet, is clearly embraced in the terms used, but do they also include the plaintiff and the other contributors to the fund?

The money was theirs, but did they pay, deliver or deposit it with the defendant? Certainly not directly; only by implication at most, according to the maxim "*qui facit per alium, facit per se.*" If Miller in making the bet, had disclosed the fact of his agency, this maxim would apply with greater force to the case.

It is the uniform policy of the law, to avoid as far as practicable, a multiplicity of suits. With this view, courts of equity require all parties in interest to be brought before them in one action, and courts of law insist that all persons jointly interested in any claim or demand, should unite in a single suit for its recovery. The same object in cases like the present, points to such a construction of the statute as would confine the right to sue to the person who actually makes the bet, and deposits the money, especially where, as in this case, he alone is known in the transaction, either by the stakeholder or the other party to the wager. The contrary rule would lead to much inconvenience when the contributors to the fund are numerous.

But a stronger reason for this construction of the act may be found perhaps in the position in which the stakeholder is placed, by holding him liable to a separate action at the suit of each of a multitude of contributors to a fund, deposited with him by a single individual as his own money, and without notice that others were interested in the transaction. How is the stakeholder to know, when called upon by a stranger claiming a portion of the fund, whether the claim is just? In the present case, for aught that appears, the written demand made on the 28th Dec. 1844, was the first intimation to the defendants that any person except Miller, claimed any interest in the money deposited with him. No evidence was furnished or offered to the defendant of the validity of the claim, and yet he was required *instantly* and at his peril, to pay over the amount of plaintiff's demand without the assent of, or even notice to Miller, that such a claim was made.

In case of conflicting claims, the stakeholder would be without the means of deciding between them, and might frequently be driven to file his bill of interpleader and carry on a protracted litigation to settle that which the knowledge of the depositor of the money would enable him at once to determine.

It would seem, therefore, more just and reasonable to leave the adjustment of contested claims to the agent to whom the parties have entrusted the management of their funds, especially as it is no part of the object of the law to punish the stakeholder, who is not in any sense a party to the illegal contract.

The cases of *Vescher v. Yates*, 11 Johns. 23; and *Yates v. Foot*, 12 Johns. 1, are relied upon by the plaintiff as settling this question in his favor. By referring to these cases, it will be seen that the point raised here, received but slight consideration. The question upon which the decision in those cases mainly turned, was, as to the right of the losing party in a wager to recover from the stakeholder the money deposited with him after the happening of the event upon which the wager depended, and as the court of errors decided this question in favor of the defendant, there was the less necessity for a critical examination of the other. It is to be observed, however, that those cases differ from the present in a material point.

From the statement of the facts, (11 Johns. 23,) it appears that Alexander, who made the bet and deposited the money with the defendant, Yates, disclosed to the latter that the money belonged to

others, and that he was acting as a mere agent. Yates, therefore, having been apprized at the time of all the responsibilities he assumed, could not reasonably complain of the hardships which might result. In addition to this, those were actions at common law, and not having been decided in view of the precise and definite phraseology of the statute, before referred to, they can hardly be considered as settling and controlling the construction to be put upon the language of that act. But even if those decisions are to be regarded as bearing directly upon the point, their authority is much weakened, if not overthrown, by the subsequent case of *Haywood v. Sheldon*, 13 Johns. 88. In that case the court not only decided that the action was properly brought in the name of the party making the bet, but Mr. Justice Yates says, "It would be of no importance on the trial of this issue what number of persons had entrusted the plaintiff with the money, and were thus interested in the bet. That was an arrangement *exclusively between the plaintiff and them*, in which the defendant had no right to interfere, and to which he was no party. He thought proper to make the contract with the plaintiff, as principal, and not as agent. It is to him alone that he is responsible." Although the action there was against the party to the wagers instead of the stakeholder, yet the principle must be the same. It is worthy of attention, too, that the language of the act upon which the action of *Haywood v. Sheldon* was founded, to wit: the act "to prevent excessive and deceitful gaming," 1 R. L., 152, sec. 3, differs from that now under consideration. It gives the action to the *loser* at any game. In *Keon v. Cahart*, 3 Wend., 494, the court recognise the principle of the case of *Haywood v. Sheldon*. In the case of *Zeilly v. Warren*, 17 Johns. 192, which was an action under the 5th section of the act to prevent horse-racing, brought by the loser against the winner of a purse of \$150. The court permitted the defendant to prove that others had contributed with him to make up the purse, and held that the plaintiff could recover only so much of the \$150 as the defendant had himself won; but it distinctly appeared in that case, that the plaintiff knew that other persons had furnished portions of the money bet.

On the whole, therefore, I see nothing either in principle or authority to prevent such a construction of the act in question, as its language, as well as convenience, and the general policy of the law would seem to require.

The motion for a new trial must therefore be denied.

[*New-York Special Term, Dec. 1848.*]

Before the Honorable IRA HARRIS, one of the Assistant Justices of the Supreme Court.

GEORGE H. SNOWHILL and others ads. JEREMIAH L. KNAPP *et al.*

NEW TRIAL.

A party applying for a new trial on the ground of surprise, must show that he has used reasonable diligence in making his motion: where, therefore, it appeared that more than four months had elapsed before making the application, and no excuse was assigned for the delay: Held, too late, and motion denied with costs. And where, on the merits, affidavits were used, which adduced evidence of a weak and unsatisfactory character, to rebut the positive evidence given on the trial, and it appeared that if such testimony had been used on the trial, the weight of evidence would have been in favor of the plaintiffs, a new trial was denied.

THE nature and character of this application appear in the opinion of the court.

E. H. Seely and E. Seely, for the defendants.

C. Shaffer and J. Cochran, for the plaintiffs.

By the Court.—HARRIS, J.—The defendants move to set aside the verdict in this cause on the ground of surprise at the trial. It is objected that the motion is too late. The cause was tried on the 14th October, 1847. Judgment was perfected upon the verdict in January following, and the papers upon which this motion is founded, were served on the 26th of February, 1848. I am not prepared to say that in every case the fact, that a judgment has been perfected upon the verdict will, of itself, be a sufficient answer to a motion for a new trial on the ground of surprise, but at any rate the party moving should be required to show reasonable diligence in making his motion, and where, as in this case, more than four months were suffered to elapse without any excuse being assigned for the delay, I think it may safely be held that the party is too late for his motion.

But upon the merits also, the motion should be denied. The suit is brought to recover for a bill of goods sold by the plaintiffs to the defendant, Snowhill. The goods were purchased by one Kilby, who was acting as Snowhill's agent in New-York. The principal question upon the trial related to the authority of Kilby to purchase upon the credit of Snowhill. A witness upon the trial testified that a few days after the first of April, 1846, in an interview between Snowhill and the plaintiff, at their store in New-York, Snowhill, among other things, stated that Kilby was his general agent in New-York, and that any transactions the plaintiffs might have with him, would be the same as if had with himself. The goods in question were sold on the 25th of May following. The alleged surprise consists in the fact sworn to by the witness that Snowhill was in New-York a few days after the first of April. A new trial is asked for, to enable the defendants to prove that Snowhill was not absent from his residence in New Jersey

 Supreme Court.—*Stokes v. Hagar.*

at the time mentioned by the witness. The affidavits of several persons are produced in support of the motion, who swear that for three or four weeks after the first of April, 1846, Snowhill was not absent from his residence. I do not regard this as the kind of surprise upon which a verdict should be set aside. At the most, the defendants show that they are able to furnish negative evidence of a weak and unsatisfactory character, to rebut positive evidence on the part of the plaintiffs. If all the evidence contained in the affidavits, read upon this motion, had been introduced upon the trial, it should not, I think, have varied the result. Upon this motion as well as upon the trial, I think the weight of evidence is in favor of the plaintiff. The motion must therefore be denied with costs.

HENRY STOKES *and others* v. WILLIAM HAGAR.

COMPLAINT—ANSWER—IMMATERIAL ISSUE.

To a complaint on two promissory notes, the defendant answered that the plaintiffs agreed to wait for payment until defendant could sell a quantity of lamps, &c., and appropriate the proceeds towards the payment thereof. Plaintiffs replied, denying that they agreed to wait &c.; the cause was noticed for trial with a supplemental notice of motion for judgment on the ground of the frivolousness of the answer: Held, that the issue made by the answer was immaterial, and that plaintiffs were entitled to judgment. Held, also, that it was immaterial that the plaintiff had replied to defendant's answer, because as the pleadings in the cause stood, no evidence that the defendant could offer on the trial would entitle him to judgment.

THE complaint was in the usual printed form on two promissory notes, one for \$116 49, and one for \$116 19. The defendant answered denying his liability and concluded as follows, "because he says, that the plaintiffs agreed to wait for the payment of said notes until the defendant could sell a quantity of Rust's Patent Lamps, then in defendant's possession, and appropriate the proceeds of the purchase money towards the payment of said notes, and that said lamps had not yet been sold.

Replication that plaintiffs never agreed to wait until, &c.

The plaintiffs' attorney noticed the issue of fact for trial at the circuit, with a supplemental notice that he would move for judgment.

The motion now came on for argument.

G. S. Stett, for the plaintiffs, submitted that the answer was frivolous, as it did not contain the requisites prescribed by the provisions of the code.

C. D. Newman, for the defendant, contended, that as the plaintiffs had replied, they had waived all insufficiencies; they had raised an issue of fact, (see *Code*, § 208,) which should be tried by a jury.

By the Court, HARRIS, J.—The plaintiffs move for judgment in this action, notwithstanding the defendant's answer, on the ground

N. Y. Superior Court.—Smith v. Oliphant and others.

of the frivolousness of the answer. The answer does not contain the requisites prescribed by the 128th section of the Code. It does not controvert any allegation of the complaint or contain any statement of new matter constituting a defence. The plaintiffs are, therefore, entitled to judgment unless they have precluded themselves by their reply to the answer. It is insisted by the defendant, that by replying to the allegations contained in the answer they have admitted that, if true, these matters constitute a defence. But suppose this motion should be denied upon this ground, and the action should be brought to trial at the circuit. The judge at the circuit would be bound, I apprehend, to render the same judgment now asked for by the plaintiffs. The issue made by the reply to the answer is, obviously, an immaterial issue. The plaintiff should have judgment notwithstanding a verdict for the defendant upon that issue. If, then, the plaintiffs at the trial would be entitled to judgment as a matter of course; if the pleadings are such that no evidence which could be offered by the defendant could entitle them to judgment, I see no good reason why the plaintiffs should not now have the judgment which they must necessarily have upon the trial, I see no objection to the practice of allowing the plaintiff, at any time as well *after* as *before* a reply, to present to the court the question as to the sufficiency of the answer. If, as in this case, it should clearly appear that there could be no available defence to the action, he should not be delayed in having his judgment. On the other hand, where there should not be found good grounds for bringing the question before the court, the plaintiff would move at the peril of being charged with the costs of resisting the motion.

The motion for judgment, notwithstanding the answer in this case, is granted.

N. Y. Superior Court.

[November Term, 1848.]

Before the Honorable T. J. OAKLEY, Chief Justice, and Justices VANDERPOEL and SANDFORD.

EDWIN SMITH v. SAMUEL M. OLIPHANT *and others.*

INFANT—NECESSARIES—RATIFICATION, AFTER MARRIAGE, OF WIFE'S PROMISE MADE *dum sola*.

An infant is not liable for money had and received, though applied for the purpose of procuring necessaries.

In an action against husband and wife, the ratification by the husband, after marriage, of the promise of his wife, made during infancy, *dum sola*, is not a good answer to a plea of the wife's infancy.

To a replication of *necessaries*, to a plea of infancy, it is not a good rejoinder that the infant was under the care of a guardian, who was willing and able to provide, and did provide necessaries for the infant.

 Superior Court.—Smith v. Oliphant.

ACTION of debt, on bond given by non-resident debtor, and sureties to discharge property, attached by sheriff upon attachment issued under non-resident Debtor Act, against the defendant, Oliphant, and Julia S., his wife, for a claim against both. Bond conditioned to pay to each attaching creditor the amount justly due and owing by the said Samuel M. Oliphant and Julia S. his wife, to him, at the time he became such attaching creditor, &c., &c.

The narr. sets out proceedings to procure warrant of attachment, but avers no levy by sheriff, and also sets out promises *by the wife* of Oliphant *dum sola*, for goods sold and delivered, money lent and advanced, and had and received, and upon an account stated; and also promises *by Oliphant*, after marriage, for the like consideration of goods furnished, &c., the wife *dum sola*. Breach, that neither husband or wife had paid.

The defendants, after craving oyer of the bond, pleaded, 1st, *non est factum*; 2d, that plaintiff was not an attaching creditor; 3d, as to the promises of Julia S., infancy, and as to those of Samuel M. Oliphant, *non assumpsi*—verification; 4th, infancy of Julia S.—verification; 5th, that neither Julia S., *dum sola*, nor Samuel M. Oliphant, after marriage, promised.

The plaintiff having got leave to reply several matters, took issue upon all but the third and fourth pleas. To the third plea he replied 1st, as to the promises of Julia S., *dum sola*, (except as to the account stated,) the goods, &c., were necessities, and the money was lent, expended and received for necessities—verification. As to the promise of Julia S., founded on the account stated, *vol. pros.*; 2d, denial of infancy of Julia S.; 3d, as to the promises of Julia S., that before the plaintiff became an attaching creditor, Julia S. became of age, and Samuel M. Oliphant, after the marriage, *ratified* the promises of Julia S., made whilst an infant, and *sole*—verification. To the fourth plea he replied, 1st, as to the promises of Julia S., *dum sola*, the goods, &c., were necessities—verification; 2d, denial of infancy of Julia S.; 3d, that before the commencement of the suit Julia S. became of age, and Samuel M. Oliphant, after the marriage, *ratified* the promises of Julia S., made whilst an infant, and *sole*—verification.

The defendants demurred to the *first*, *second* and *third* replications, to their *third* plea. To the *first replication*, the grounds of demurrer were, 1st. It contained no answer to the plea as to the promises of Samuel M. Oliphant. 2d. It contained no answer as to the promises of Julia S., upon the account stated. 3d. It was bad for departure, as the declaration counted on two separate sets of promises, those of the wife and those of the husband, and this replication abandoned those of the husband. 4th. The *vol. pros.* as to the promise on the account stated was a nullity. To the *second replication*, the grounds of demurrer were substantially the same as to the *first*.

To the *third replication*, the grounds of demurrer were like the last two; besides, 1st. It did not specify how Samuel M. Oliphant, *ratified* the promises of Julia S., made *dum sola* and an infant. 2d. The ratification of Samuel M., of a contract made by the wife *dum sola*

and an infant, was void without consideration. An express promise was necessary.

The defendants rejoined to the *first replication* to their *fourth plea*, that at the time when the goods, &c., were supplied to the infant Julia, she was under the care of a guardian, J. B.; and J. B., during all the time was able and willing, to furnish and provide, and did furnish and provide for Julia, the infant, all goods, &c., and necessities, suitable and proper to her degree, condition and estate—verification. The defendants added a *similiter* to the *second replication* to their *fourth plea*, and rejoined to the *third replication* to their *fourth plea*, denying the ratification by Samuel M. Oliphant.

The plaintiffs joined in demurrer to the demurrers, and then demurred to the defendant's rejoinder to his first replication to their fourth plea. The grounds of demurrer were, 1st. It was argumentative. 2d. Defendants should have directly denied the goods were necessities. 3d. It set up matter of evidence and not facts. 4th. It was unusual, and tended to prolixity. 5th. It was double and raised a multiplicity of issues.

The defendants joined in demurrer, and the cause was submitted on written points.

Augustus L. Brown and *Albert Mathews*, for defendants in support of demurrers to first, second and third replications to third plea, and of rejoinder to first replication to fourth plea. As to demurrer to first and second replications, cited *Earl v. Peal*, 1 Salk. 386. *Probart v. Knouth*, 2 Esp. 472. *Trueman v. Hurst*, 1 T. R. 40, 42. *Gray v. Pindar*, 2 Bos. & Pul. 427. 1 Saunders' R. 28 a, note 3; 109 a, note a. *Randall v. Sweet*, 1 Denio, 460. As to the demurrer to the third replication, *Bingham on Infancy*, 21. Nothing short of an express promise, supported by a good consideration, made by the husband to pay the debt of his wife, contracted *dum sola* during infancy, is available to the creditor. *Sandford v. McLean*, 3 Paige, 117. *Derby v. Boucher*, 1 Salk. 27. A mere ratification of a promise made by another, voidable in its inception, not made for his benefit, to which he was neither party nor privy, is at best, *nudum pactum*. *Randall v. Sweet*, 1 Denio, 460. The replication was bad for departure; for if true, a ratification would bind the husband. The attachment should have been issued against him alone. *Darby v. Boucher*, 1 Salk. 279. *Stone v. McNair*, 7 Taunt. R. 432. 1 Chitty Pl. 500, (fifth Am. Ed. from 4th Lond.)

As to the rejoinder demurred to, it was good in substance. *Kline v. L'Amoreux*, 2 Paige, 419. 2 Kent Com. 239. As to its form, *Angel v. McLellen*, 16 Mass. 28. *Bainbridge v. Pinckney*, 2 Blk. R. p. 1325. *Robinson v. Rayley*, Burr. 320. *Patcher v. Sprague*, 2 Johns. 462.

It was further contended by defendant's counsel, that the plaintiff's declaration was bad in substance, and the defendants could attack it, although they had pleaded *non est factum*, &c. To this point were cited *Patcher v. Sprague*, 2 Johns. R. 464. *Harker v. The Mayor*,

Superior Court.—Smith v. Oliphant.

9 Wend. 201. *Mattheus v. Weller*, 3 Denio, 52. *Auburn and Owasco Canal Co. v. Leitch*, Law Rep. Vol. X. p. 201. It did not show jurisdiction in the officer who took the bond. *Homar v. Brickhoff*, 1 Denio, 184. *The People v. Brown*, 23 Wend. 47. *Dakin v. Hudson*, 6 Cowen, 221. *Wyman v. Mitchell*, 1 Wend. 316. *Bose v. Dean*, 7 Mass. 28. *Commonwealth v. Leveridge*, 11 Mass. 337. *Commonwealth v. Otis*, 16 Mass. 198. The attachment improperly issued against property of wife. *In the matter of Hurd*, 9 Wend. 465. The breach assigned was double and multifarious. The *narr.* is composed of two inconsistent sets of causes of action, improper and misjoined. *Edwards and wife v. Davis*, 16 Johns. 281. *Morris and wife v. Norfolk*, 1 Taunt. R. 212. *Graner v. Exhart*, 1 Binney R. 586. *Stone v. McNair*, 1 J. B. Moore R. p. 126.

Charles T. Cromwell, for plaintiff, urged, that the defendants could not attack the *narr.*, and cited *Rupert v. Snyder*, 5 Wend. 104. *Wheeler v. Curtis*, 11 Ibid. 653. *Dearborn v. Kent*, 14 Wend. 187. In support of the *narr.* *Benjamin v. Bartlett*, 3 Mass. 86. *Gage v. Reed*, 15 Johns. 403. 2 Chitty Pl. 57. *Angel v. Felton*, 8 Johns. 149. *Douglass v. Satterlee*, 11 Johns. R. 16. *Glover v. Tuck*, 24 Wend. 153. In support of the demurrer to the rejoinder, demurred to, *Dyett v. Pendleton*, 8 Cowen, 727. *Church v. Gilman*, 15 Wend. 656. 2 Saund. on Plead. and Ed. 100, tit. Infancy. *Wheeler v. Curtis*, 11 Wend. 653. *Bank of Auburn v. Weed*, 19 Johns. 300. *Ford v. Fotheryville*, Peak. N. P. 229. 1 Esp. 211. *Clock v. Leslie*, 5 Esp. 28. *Hand v. Storey*, 8 J. R. 578. 5 Mod. R. 368. *Montara v. Hall*, 6 Simons, 467. *Cook v. Danton*, 3 C. & P. 114. Petersd. Abr. 540. tit. Infancy. In support of the first and second replications to third plea, he cited *Randall v. Sweet*, 1 Denio, 460. *Earl v. Peal*, 1 Salk. 386. The defendants had taken issue by pleading *non assumpsit*, as to the promises of Samuel M., and there was complete issue joined as to them, and the plaintiff need not reply further as to them. As to third replication to third plea. A husband might ratify the promise of his wife made while sole and an infant. *Rex v. Chelsford*, 4 B. & C. 100. *Zouch v. Parsons*, 2 Burr. 1805. Bingham on Infancy, 222. It was also claimed that under sec. 151 of the Code, the plaintiff was entitled to judgment on the demurrers.

BY THE COURT.—It is not necessary to pass upon the declaration or the *nolle prosequi*. The defendants, by their third plea, have sufficiently put at issue the promises of Samuel M., and the causes of demurrer based upon the allegation that plaintiff passes them by in his replications falls to the ground. The plaintiff's first replication to the defendant's third plea, which seeks to charge the infant for *money had and received*, is bad. The second replication to the third plea is good. The third replication to the third plea, setting up the ratification by the husband, of the wife's promise, made *dum sola* during infancy, is bad. The defendant's rejoinder to the plaintiff's first replication to their fourth plea, is bad, because argumentative and multifarious, and

Court of Common Pleas.—Manning v. Dayton, Sprague and Thurber.

sets up matters of evidence. But the replication being bad in substance, for the same reasons as the first replication to the third plea, defendants must have judgment on this demurrer. The rule will be judgment for the defendants on demurrer to the first and third replications to the third plea, and on the demurrer to the rejoinder to the first replication to the fourth plea, on the ground that that replication is bad in substance, as well as the rejoinder, and judgment for the plaintiff on the demurrer to the second replication to the third plea. The plaintiff may have leave to withdraw the replications held bad, and reply *de novo*, or amend his declaration if advised, on payment of the costs of any new pleas, that may thereby be rendered necessary, and each party is to pay the costs of the demurrers decided against him, in ten days after notice of the rule.

Court of Common Pleas.

[*New-York.*]

Before the Honorable M. ULSHOEFFER, First Judge, and Assistant Judges INGRAHAM and DALY.

STELLE MANNING v. GEORGE DAYTON, EDWARD D. SPRAGUE *and*
AUGUSTINE A. THURBER.

M. sold to T. a quantity of corn, for which B., a broker, who effected the sale, became security. The corn was delivered by M. to D. and S., who purchased from T. T. having failed to pay M., B. the surety, paid part of the consideration to M., and a notice was served on D. and S. a few days afterwards that the contract was rescinded for fraud in not paying cash for the corn. In an action brought in the name of M., but for the benefit of B., to recover the corn from D. and S. and T.:—*Held*, that such action could not be sustained.

THE plaintiff in this case sold to defendant Thurber, a quantity of corn for which Bame, a broker, who effected the sale, became security. The corn was delivered by the plaintiff to Dayton and Sprague, who purchased from Thurber.

Thurber having failed to pay the plaintiff, Bame the security paid \$800 on account to the plaintiff, and a notice was served on Dayton and Sprague, in the name of the plaintiff, a few days afterwards, that the contract was rescinded for fraud in not paying cash for the corn.

This suit was then brought in the name of the plaintiff, and for the benefit of Bame to recover the corn from Dayton, and Sprague and Thurber.

G. A. Shufeldt, for plaintiff.

Ellis and Shepherd, for defendant.

INGRAHAM, J.—I am at a loss to see upon what ground the plaintiff can sustain this action. Laying out of view the question which arises as to fraud on the part of Thurber, in making the purchase, and as-

Court of Common Pleas.—*Manning v. Dayton, Sprague and Thurber.*

suming that the sale to Thurber was on account of the plaintiff, with Bame only as the surety, still it appears that the plaintiff has received from the surety, the whole of the purchase money, except about \$170. He certainly has no right to recover from the defendant in this action, the whole value of the property for himself. In order to permit such a recovery, he should first return what he has received, whether received from the principal or surety. A contrary rule would enable the plaintiff to recover the whole value of the property from the principal, and yet retain eight hundred dollars from the surety. I know of no ground upon which the surety could recover back the money. The very reason for which the plaintiff seeks to recover in this action was the object for which the security was required, viz : the non-payment by Thurber. The best view of the case for the plaintiff, shows that he was unwilling to trust Thurber, and refused to sell to him without security. To hold a contract under such circumstances void after the vender had received from the surety the greater part of the purchase money, would be carrying that doctrine much further than could be sustained by any of the cases.

If the case involved merely the question of fraud in the purchase by Thurber, the fraud might be made out within the case of *Leven v. Smith*, 1 Denio, 571. The plaintiff was bound, however, in order to rescind the contract to do so on the first opportunity. Instead of such a course on his part after the sale was made on 25th of May, and delivery on 26th and 27th of May, the plaintiff, knowing that payment had not been made in cash by the vendee, received on 29th May, \$505 from the surety, and on 5th June, \$300 from the surety, and attempted to rescind the contract on 2d June. The reception of money on account after knowledge of the fraud, was a waiver of the vendor's right to rescind the contract, and more especially so after he had given notice of his intention to rescind.

I think, also, there is difficulty in holding the defendant liable under the circumstances proven here, even if Thurber was. The plaintiffs delivered the corn in pursuance of their contract of sale, to Dayton and Sprague, who had sold it to Brown and Neilson, and into whose possession it went, upon such delivery. The notice to defendant and demand from them, was long after the delivery to Brown and Neilson, and when, by the plaintiffs' own act, it was impossible for them to rescind the contract and return the goods. Where there was no pretence of fraud on the part of Dayton and Sprague, the notice of the 2d June, was too late. It does not affect this ground of defence, to allege that Dayton and Sprague had not paid over the money to Thurber. They had no right to elect to pay the plaintiff instead of Thurber, if they had the title to the property from him by the assent of the plaintiff; or at least they were not bound to assume the responsibility of proving the fraud on the part of Thurber. It has been said on the argument, that this action was for the benefit of Bame, who on having paid for the property, became substituted in the place of the plaintiff, and had a right to bring the action in his name. It is a sufficient answer to such a suggestion, to say that no such rule applies to torts, even if it were applicable to an action for the purchase money.

Court of Common Pleas.—Turner v. Comstock.

There is a class of cases in which such actions have been maintained in the name of the principal where the representations were made to the clerk or agent. 7 *Wend.* 10. 3 *T. R.* 272. 12 *Wend.* 176. In the latter case the money was advanced by the agent, but the decision is put by the chief justice upon the ground, that if there is no want of prudence on the part of the agent the loss falls upon the principal and not on the agent.

Here there is no ground for such a supposition. The plaintiff has received his money for the property he sold. He can sustain no loss by the fraud which he now alleges has been practised upon him, and I know no rule of law by which the surety, upon failure of his principal, can pay the money in pursuance of the contract and then avoid the contract in the name of the person to whom he has paid the money, on the ground of fraud.

I think the verdict should be set aside and a nonsuit ordered.

SETH TURNER *against* ERASTUS COMSTOCK.

**PROMISSORY NOTE—DEMURRER TO COMPLAINT—WANT OF AVERMENT
THAT NOTE WAS PROTESTED.**

In a complaint on a promissory note against the endorser, the plaintiff omitted to aver that the note was duly protested, so as to charge the endorser: Held, on demurrer, that the complaint was defective.

THE complaint alleged that George W. Ayres, on the 24th day of April, in the year one thousand eight hundred and forty-eight, at New-York, made his promissory note in writing, whereby he promised to pay to the order of the defendant, by the name of E. Comstock, two hundred and sixty-three dollars and ninety-one cents, four months after the date thereof, for value received, that the said defendant duly endorsed the said note, that the plaintiff is the lawful owner and holder of the said promissory note, and the defendant is justly indebted to him therefore in the sum of two hundred and sixty-three dollars and ninety-one cents, principal, together with interest, for which principal, sum and interest, the plaintiff prays judgment.

Demurrer for the following cause, to wit, that the complaint does not set forth sufficient to constitute a cause of action.

Gridley, the want of an averment in the complaint, as to the note being demanded of the maker, and notice of non-payment given to the endorser, is a matter of defence, and the defendant can avail himself of it by answer to the complaint.

H. P. Allen and *Hudson*, contra.

I. The demurrer assigns the special cause provided for by the code.

II. The defendant is an endorser, and to make him liable, three

things are necessary. (1.) The endorsement. (2.) Demand of payment. (3.) Notice of non-payment to the endorser.

III. The complaint must allege sufficient to bind the defendant as endorser, and must, therefore, contain the three allegations above named. This is evident from the fact that the code allows as a cause of demurrer, the mere allegation that sufficient does not appear on the face of the complaint to bind the defendant.

IV. No demand of payment or notice of non-payment is alleged or pretended in the complaint.

V. The demurrer is therefore well taken.

VI. If the plaintiff is allowed to amend it must be on terms.

INGRAHAM, J.—The complaint in this case alleges the making of a promissory note, payable to the defendant or order, and endorsed by him, that the plaintiff is the owner of the note, and that the defendant is justly indebted to him therefor. This is demurred to as not showing sufficient facts to make out a cause of action.

There is some difficulty in saying how far it was intended by the code to compel particularity in stating the cause of action in the complaint. It must contain a statement of the facts constituting the cause of action, all the material facts to make out the case before a jury should be averred in the complaint. If they are not so stated, then it does not contain a statement of the facts, and may be demurred to, under section 122.

The provisions in regard to the answer also require this rule as above stated. The defendant may, in the answer, deny any particular averment, and thus form an issue for trial, and all the other matters alleged are to be considered as admitted.

This view also appears to be the correct one, from the provisions of section 149, which allows the court to amend the pleadings by *inserting other allegations material to the case*, which would be unnecessary if as is contended, the defendant must take the objection by way of new matter set up in the answer. He may demur as in this case, or may take the objection in the answer. Sect. 126. In this case the plaintiff has omitted to aver in the complaint that the note was duly protested to charge the endorser. This is necessary both by way of allegation in the complaint, and by proof if disputed, in order to make out a case to entitle the plaintiff to recover, and in this respect the complaint is defective. The defendant, therefore, is entitled to judgment upon the demurrer, with liberty to the plaintiff to amend his complaint.

The costs of the defendant, if the amendment takes place, must abide the event of the suit. Where the question is a new one, and especially where the object is to settle the form of the pleadings, under such an entire change of the practice, it has not been customary to impose costs as a condition of amendment, except to leave them to abide the result, and I adopt the same rule in this case.

Surrogate's Court.—In the matter of Peter H. Vandervoort.

Surrogate's Court.

[New-York County.]

Before the Honorable ANTHONY L. ROBERTSON, Surrogate.

*In the matter of the Account of PETER H. VANDERVOORT, Executor of
WILLIAM VANDERVOORT, deceased.—2d December, 1848.*

Where real estate, subject to a power of sale by executors, has been sold under a decree of a court of Chancery, and the proceeds paid over to the heirs by order of that court, the executors cannot be made accountable in a Surrogate's Court for such proceeds.

Where there is a trust created by will of the rents of real estate, for the benefit of a family, while "they continue such," and there is no similar trust of the proceeds of the sale of such lands, under a power contained in such will, such power, though not limited in terms, cannot be exercised until the family has broken up.

At common law, spiritual courts had no jurisdiction over real estate or its proceeds, notwithstanding supposed dicta in *Bogert v. Hertell*, 4 Hill, 494, *Stagg's ex'r. v. Jackson*, 2 Const. R., 206, to the contrary.

Distinction between legal and equitable assets considered; lands ordered to be sold by will are legal, those authorized to be sold are equitable assets. The Surrogate's Court has only jurisdiction to compel an account in case of the former, where there is an "out and out" conversion.

A power of sale, where the grantees of such power have authority to make such partition as they deem best, is not an imperative power, or an out and out conversion.

Though a power to sell for the purpose of distribution be an entire conversion, yet if one of the distributees die before actual conversion, and the grantees of the power are trustees for his heir, not his personal representative.

THE circumstances of this case appear in the opinion of the surrogate.

THE SURROGATE.—The application for the account in this matter is made by the administrator of Robert Bruce Vandervoort, a son of the testator. The applicant claims that the surviving executor, who is cited to render such account, should, in addition to his account of personal estate account for the rents, and the proceeds of the sale of lands. To this the executor objects; 1st, that the land having been sold by proceedings in chancery, *in invitum*, the proceeds were paid over to the heirs of Mr. R. B. Vandervoort, by authority of that court, he has nothing to account for; 2d, that the heirs, and not the personal representatives of the deceased, are alone entitled to any account; 3d, that this court has no jurisdiction to compel an account of the rents received by him.

As to the *first* point, as the executor can only be made accountable for what he has actually received as proceeds of sales, he undoubtedly is not bound to account for moneys paid over by the Court of Chancery to the heirs.

The second and third points will be found to depend on the question, whether this be an "*out and out*" conversion by the will, as will be seen by separately considering them. The will made in 1836, devises to two persons, since deceased, and the applicant's intestate, (who are also therein appointed executors,) as joint tenants, all the

Surrogate's Court.—In the matter of Peter H. Vandervoort.

estates of the testator upon trust, to receive the rents of the real, to collect the personal, and out of such moneys to pay premiums of insurance, and reasonable amounts for the maintenance of his family, "so long as they remain together as such," and "on the further trust that they have power to sell every part of his real estate," and "dispose of the consideration money, so received for the sale, towards the payment of incumbrances, or otherwise, at their discretion," and that "all moneys coming into their hands, up to the period of the settlement of his estate, which shall remain as a balance, shall be distributed and divided to and amongst his children, or the children or child of any child who may be dead, as if he had died intestate." It also provided that the executors might from time to time "make such divisions, exchanges and dispositions of all his real estate among his children, as might be beneficial to his estate." The present executor was added by a codicil.

The first question that arises is, whether the children of the deceased intestate take as heirs of their father, if the estate was unconverted at the time of his death, or as purchasers under the will; and it is contended by the executors, they take in the latter capacity under the clause, "children of those who are dead." The time of death must, of course, depend on some other contingency, and the only period indicated is that of "the settlement of the estate;" and the only settlement of the estate pointed out, is where the "family" cease "to remain together as such." Until that takes place there is a trust of rents and personal estate for their support. No provision is made for a like trust of the income of the proceeds of the sales of real estate; it is not to be presumed that the power of sale was to be exercised, and the proceeds divided among the parties before the family separated, indeed as its suspension would depend on the parties electing to keep together as a family, it would plainly be a sensible mode of producing family harmony and union, and such appears to have been the testator's object. Even if, therefore, "the moneys remaining as a balance," be not simply that portion of the personal property which remained unexpended on the purposes of trust, (to which construction I incline, as the executors are afterwards authorized to divide the land specifically,) the children of those who were dead when the family broke up, would take as purchasers, and be the only persons entitled to demand an account. If, however, the sale was to be for general purposes of distribution, it still remains to be examined whether it descended to the children as real estate, or passed to the personal representative of Robert B. Vandervoort, as personal assets. This, as the property was not actually sold by the executors, would depend on the question whether the conversion was out and out.

The other point will also be found on examination to depend on the same question. At common law, spiritual courts had no jurisdiction over the payment of debts at all, or over real estate or its proceeds; land not being subject to the payment of certain debts at all, created the distinction between legal and equitable assets; the former being those where preference was observed, and the latter where the proceeds

were brought into a court of equity and distributed equally among all the creditors of the testator. 2 *Williams on Executors*, 133. Spiritual courts, therefore, never had any power to apply the proceeds of the sale of real estate to the payment of debts, because they never were legal assets, the *dicta* to the contrary in *Bogert v. Hertell*, 4 Hill, 494, and *Stagg's ex's v. Jackson*, 2 Comst. 206; are wholly unsupported by reason or authority and were not necessary to the decision of those cases; in fact, the case of *Silk v. Brine*, 1 Bro. Ch. C. 188, in notes, cited in the former, directly contradicts it, and the work cited in the latter, (*Ram. on Assets*), in a subsequent part to that quoted, (p. 321,) states that the authorities cited in the former part have since been overturned by subsequent cases, two of which I shall now examine. The first is that of *Clay v. Willis*, 1 B. & C. 364. That was an action at law for money had and received, the plaintiffs were administrators with the will annexed; the defendant was an executor of an agent of two executors under the will, who were also devisees of real estate in trust to sell to pay debts; a prior mortgagee had sold the land after the testator's death, and paid over the surplus of proceeds to the defendant's intestate as agent of the executors; the action was held not to be maintainable, because the assets were equitable, and could not have been recovered by the original executors *quod* executors. The second is that of *Barker v. May*, 9 B. & C. 489. That was an application for a prohibition against a consistorial court, to prevent its taking cognizance of a claim for a legacy made by a legatee against a devisee in trust, to sell by a will which gave the legacy, and in which the proceeds were directed to be deemed part of the personal estate, to pay the legacy in question and other legacies. The Court of King's Bench granted the prohibition, because the assets were equitable, and Lord Tenterden added, that the direction to consider the proceeds personal estate, could not alter their legal character. Since those cases, no one has been bold enough to attempt to enforce payments of debts or legacies in a common law or ecclesiastical court, out of the proceeds of the sale of real estate. I am therefore, satisfied, that I have no jurisdiction over these proceeds at common law.

The statute of 1822, (*Laws of 1822*, p. 283, § 3,) provided that wherever lands were sold under a power contained in a last will, the same might be distributed by the surrogate; this converted such proceeds into legal assets and subjected them to preferences. The *Revised Statutes*, in 1830, changed this phraseology and inserted the word "*ordered*," still preserving their character as *legal* assets, by the express direction, that the distribution should be as of personal property in the hands of an administrator, which still subjects them to the priority of certain debts. 2 *R. S.* 110, § 57. Subsequently the Legislature in 1837, added another provision, that the proceeds of sales made in pursuance of a testamentary authority might be brought into the surrogate's office for distribution, but it was made *equitable* assets by the subsequent clause which placed them on a footing with the proceeds of real estate ordered to be sold by the surrogate

Surrogate's Court.—In the matter of Peter H. Vandervoort.

on the application of creditors, which were rateably distributed. *Laws of 1837*, p. 536, § 75. There can be no question that the statute of 1830, only applied to cases of out and out conversion, not only from the change of language from that of the old statute, and the legislative interpretation put on this section by the act of 1837; but also from the fact, that the immediately preceding section speaks both of the cases, where lands are devised to be sold, and where they are ordered by will to be sold, whereas this speaks of but the latter only. The case of *Stagg's ex's v. Jackson*, 2 Comst. R. 206, under the equity of this statute, where land was ordered to be sold, has held that rents, which are to form a common fund with the proceeds of sale, are also to be accounted for before the surrogate as a species of limited conversion, overlooking the fact, that assets are specifically enumerated in the statute, (2 R. S. p. 82, § 6,) which was not urged in the court of appeals on the argument, although the revisors in their notes declare, in that enumeration, their object to have been to save all questions as to what constituted assets.

The only question that remains therefore is, whether the executors were not allowed by the will any discretion as to selling, so as to make it a complete conversion. I think, without undertaking positively to say, that their power of sale was intended to be confined to paying off incumbrances, the power to make divisions without sale, if they deemed best, takes away the imperative character of this authority to sell, and makes it alternative to sell or divide as they think proper, and does not order them to sell absolutely; for this reason, I think, this case does come within the statute, and the Surrogate's Court has no jurisdiction.

There is also, another ground upon which I think the present applicant has no right to require an account. Though a power to sell for the purposes of distribution, be an entire conversion of land into money. Yet, if one of the distributees die before actual conversion, the conversion so far as his representatives are concerned is not complete and the executor is accountable for the proceeds only to his heir, (*Smith v. Claxton*, 4 Mad. 484. *Bogert v. Hertell*, 4 Hill, 498,) so that in this case the children of Mr. R. B. Vandervoort, not his administrators, would be the proper persons to require an account, and the court of chancery has so held and ordered the proceeds paid over to them.

I have withheld as unnecessary any consideration of the question, whether this executor had any power over the real estate, as the codicil only gave the same powers and interests to him as if he were nominated an executor in the will. Nominating him as executor would not give him the power, and the power is given to the parties by name and not to executors generally.

Upon the whole, therefore, I am of opinion that I have no jurisdiction over real estate, or its rents in this matter, and that if I had, the present applicant is not the proper person to claim it; the question of costs as to this claim, must be disposed of in the final decree.

Court of Queen's Bench—*Ringham v. Clements*.

ENGLISH CASES.

Court of Queen's Bench.

[Trinity Term.]

Before the FULL BENCH.

RINGHAM V. CLEMENTS.—30th May, 1848.

TROVER—PLEADING.

Trover for household furniture. Pleas, first, not guilty; second, that plaintiff was not possessed. It appeared that plaintiff was indebted to defendant, and that the wife of plaintiff, in his absence, gave the furniture to defendant in payment of his debt, and that he then took it away: the jury found that the wife had sufficient authority to do so:—Held, that defendant was entitled to a verdict upon both issues.
 Semble, that evidence of leave and license is receivable under the plea of not guilty.

TROVER for household furniture. Pleas, first not guilty; second, that the plaintiff was not possessed, &c., issues on both pleas. The proceedings on the trial before Patteson, J., the summer assizes for Suffolk, in 1847, are sufficiently stated in the judgment of the court.

Byles, Serjt., having obtained a rule nisi, to enter a verdict for the plaintiff, on the ground that evidence of leave and license was not admissible under the plea of guilty.

O'Malley showed cause. Conversion is an unlawful act, and therefore, there is no plea in trover but not guilty, and a release. *Bac. Abr.*, "Trover," F. 2; *Ward v. Blunt*, Cro. Eliz. 146; B. N. P. 48 a; *Alderson, B.*, in *Mason v. Farnell*, 12 Mee. & W. 674, 683, referring to the plea of not possessed. The decision in *Stancliffe v. Hardwick*, 2 C. M. and R. 1, 5 Tyrw. 551; has been doubted by *Parke, B.*, in *Whitmore v. Green*, (18 Mee. & W. 104, 107; 8 Jur. 697, 698); and by *Creswell, J.*, in *Wilkinson v. Whalley*, 5 Man. & Gr. 590, 597; 7 Jur. 468. It was recognised by this court in *Wheeling v. Aldrick*, (9 Adol. & Ell. 861; 1 Per. & D. 657,) before the court of exchequer changed their opinion. [He also cited *Kynaston v. Crouch*, (14 Mee. & W. 266, 272; 9 Jur. 584, 585,) and *Higgins v. Thomas*, (10 Jur. 753.)] The plea of not guilty in an action for defamation puts in issue the malicious speaking of the words. In *Christopherson v. Bare*, (12 Jur. 374,) it was held, that a plea of leave and license to trespass for assault and imprisonment was bad.

Couch, contra.—The conversion in this case was an actual taking and removal of the goods, not a constructive conversion, to which only the dicta of the judges in the court of exchequer have reference.

Court of Queen's Bench.—*Ringham v. Clements.*

If A. takes the goods of B. and converts them, he does not the less do so, because he has the leave of B. to take them. [Lord *Denman*, C. J.—In the language of the law conversion is wrongful, though in the natural course of things the taking might not be so. *Wightman*, J.—The argument founded on the action of trespass does not apply: there is no analogy in this respect between the two actions, unless the declaration in trespass went on to state, “and so he trespassed,” or unless the declaration in trover stopped after stating that the defendant seized and used the goods.] In the new rules, “obstruction,” is a wrongful act; and the language as applicable to an obstruction cannot be distinguished from the language of the rule applicable to trover. In case for wrongfully obstructing or diverting a stream of water, the plea of not guilty puts in issue the obstruction or diversion, not the wrongfulness of it. *Frankum v. The Earl of Falmouth*, 2 Adol. & Ell. 452. In trover against the sheriff, it is not necessary to plead a seizure under a *feri facias*, where it is prior to an act of bankruptcy. [*Wightman*, J.—The plea in these actions is always not possessed. If the defendant admits the property to be in the plaintiff, he would find it difficult to plead specially; the whole question is one of property.] In *Samuel v. Duke*, (3 Me. & W., 622,) it was held, that in trover against the sheriff and the execution creditor, it was not competent for the sheriff, upon the plea of not possessed, to give in evidence facts justifying the seizure. [*Wightman*, J.—That plea is pleaded, not to the conversion, but to the property; in a special plea, the conversion must be confessed.] It has been said that the plea of not guilty and not possessed make up the old plea. [*Patteson*, J.—In *Picard v. Sears*, (6 Adol. & Ell., 469,) this court held, that the defendant might, under the plea of not possessed, give in evidence a leave by the owner of the goods, for them to be in the possession of a third person.] The effect of holding that leave and license may be given in evidence under not guilty, will be to limit the pleas in trover to not guilty and not possessed, except in the case of a release. [*Earle*, J.—Possession means right of possession. *Wightman*, J.—The plea is, that the goods were not the goods and chattels of the plaintiff; it would come to this, that nothing is now allowable in trover but traverses. *Patteson*, J.—A right of lien also would not be admissible under the plea of not guilty, because it denies possession.]

Cur. ad vult.

LORD DENMAN, C. J., now delivered the judgment of the Court.—This was an action of trover; to which the defendant pleaded, first, not guilty; secondly, that the plaintiff was not possessed.

It appeared at the trial, that the plaintiff was indebted to the defendant, and that the wife of the plaintiff, in his absence, gave the furniture in question to the defendant, in payment of his debt, and that he then took it away. The jury believed that the wife had sufficient authority to do so, and found a verdict for 10*l.* 7*s.*, if the court should be of opinion that the defence was not admissible under either of the

Court of Common Pleas.—Hardingham v. Allen.

pleas, but ought to have been specially pleaded; and a rule *nisi* was granted accordingly.

At the trial, the defence was treated principally as one of leave and license, and so upon the argument; and the general question has been discussed, whether the word "converted," *ex vi termini*, means "wrongfully converted;" so that any evidence which shows that what the defendant did was rightful, must be admissible under the plea of not guilty, as negating "conversion."

Upon consideration, however, we are of opinion that when the wife, with the authority of the plaintiff, (as must be taken to have been found by the jury,) gave the goods to the defendant, the property in them passed to him, and therefore, his taking them, which was the conversion relied on, was a taking of his own goods, and not the goods of the plaintiff; and so the second issue was properly found for the defendant. *Vernon v. Shipton*, 2 Mee. & W. 9; *Pickard v. Sears*, 6 Adol. & Ell. 469.

In this case, there was a demand and refusal; but as that is not an actual conversion, but only evidence of one, it seems to follow that any evidence explanatory of the demand and refusal, must be receivable under the plea of not guilty, because it goes directly to show, that there is no conversion at all. In the present case, however, that point does not arise, because the original taking was an actual conversion, and no subsequent demand and refusal could constitute a second conversion.

This being a case not of mere leave and license, but of transfer of the property previous to the taking by the defendant, the verdict was right, and the rule must be discharged.

Rule discharged.

Court of Common Pleas.

[*Easter Term.*]

Before the FULL BENCH.

HARDINGHAM V. ALLEN, 26th April, 1848.

TENDER—APPROPRIATION OF SUM TENDERED.

Evidence that a debtor tendered, in discharge of a claim comprising several items, a sum in gross less than the whole sum claimed, without specifying to which items it was to be applied, does not prove a tender in discharge of a particular item.

DEBT for money had and received, with a count in detinue for the detention of a horse. Plea to the last count, a lien of 10*s.* for trying the horse in harness. Replication, tender of "the said sum of 10*s.* for the trial and examination of the said horse, &c." Rejoinder, "that the plaintiff did not tender the said sum of 10*s.* for the trial and

Court of Common Pleas.—Hardingham v. Allen.

examination of said horse, in manner and form," and issue thereon. The cause was tried at the sittings in London after last *Hilary Term*, before *Wilde*, C. J., when it appeared that the defendant, who had received the plaintiff's horse at his repository for sale, refused to re-deliver it to the plaintiff, unless the plaintiff first paid the defendant's bill, which comprised the following charges:—

1847. July 31, Bay Gelding, bait,	£0 1 6
" Auction,	5
Aug. 4, Bay gelding, 3 days,	10 6
Aug. 3, To cash paid for trial of bay geld- ing in harness,	10 0
	£1 7 0

The plaintiff said the charges were exorbitant, and put down 19s. 6d., which the defendant refused to take. The plaintiff then demanded his horse without effect, and came away leaving the money on the counter. The learned judge being of opinion that the replication was not proved, nonsuited the plaintiff.

Huddleston moved for a rule *nisi* to set aside the nonsuit, and for a new trial. The tender was proved. The defendant, in his plea, claims a lien for 10s.; the plaintiff replies, and proves a tender of 19s. 6d. [*Wilde*, C. J.—I said at the trial, that if a debtor pays a sum in gross to a creditor having several claims, the debtor has a right to apply it to which claim he pleases; but if he makes no specific appropriation, the creditor may apply it as he pleases.] It was for the jury to say whether 19s. 6d. was not sufficient to cover the whole demand; there was no need for the plaintiff to specify how it was to be applied; (*Douglass and others v. Patrick*, 3 T. R. 683;) the only question was whether or no the 10s. was tendered. If more than the sum tendered was due, the defendant should have rejoined to that effect. [*Creswell*, J.—Not so. The traverse is, that the plaintiff did not tender the said sum of 10s. for the trial of the horse.] Then it was for the jury to say whether he did so or not.

COLTMAN, J.—There is no ground for granting a rule in this case. As to the issue on the tender, undoubtedly, if 19s. 6d. was sufficient to cover the whole of the defendant's claim, it was a good tender as to 10s. of it; but if it was insufficient to cover the whole, it was (in the absence of express appropriation by the plaintiff,) insufficient to cover any specific part. The learned judge offered to leave to the jury the question as to the sufficiency of the sum tendered in discharge of the total amount claimed by the defendant, but the plaintiff's counsel elected to be nonsuited. It appears to me that there was no evidence to prove that the plaintiff appropriated the 19s. 6d. to any one portion of the claim rather than to another; and there will therefore be no rule.

WILDE, C. J., *CRESWELL* and *WILLIAMS*, J. J., concurred.

Rule refused.

THE
New-York Legal Observer.

VOL. VII.] NEW-YORK, FEBRUARY, 1849. [MONTHLY PART.

CHALLENGING JURORS.

OPINION OF JUDGE OGDEN EDWARDS UPON THE QUESTION, WHETHER
HAVING AN OPINION, OR EVEN EXPRESSING IT, THAT A PERSON
IS GUILTY, LEGALLY DISQUALIFIES FROM SERVING AS A JUROR.

ARTICLE II.

SIR WILLIAM BLACKSTONE follows Lord Coke, and quotes as a cause for principal challenge, among others, "*that the juror has been an arbitrator,*" but is silent as to the expression of an opinion being a cause of principal challenge. 3 *Bl. Comm.* 363.

Hawkins says, "It hath been adjudged a good cause of challenge on the part of a prisoner, that the juror hath a claim to the forfeiture which shall be caused by the party's attainder or conviction; or that he hath declared his opinion beforehand that the party is guilty, or will be hanged, or the like; yet it hath been adjudged, that if it shall appear that the juror made such declaration from his knowledge of the cause, and not out of any ill will to the party, it is no cause of challenge." *Hawk. B.* 2. 42, 128.

This was precisely the question in the court of Oyer and Terminer, in the case of *The People v. Barker*, 7 or 8th Cowen, for every juror impanelled disclaimed, under oath, having any ill will or prejudice against the defendants.

The next elementary work which I shall quote, is Chitty's Criminal Law. This is a treatise of acknowledged ability and accuracy, so much so, as, in a great measure, to have superseded all others upon criminal law. It was published in 1816, and may, therefore, be fairly presumed to furnish us with the law as it is understood by the profession at the present day in England. He says, "That if a jurymen has expressed his *wishes* as to the result of the trial, or his opinion of the guilt or innocence of the defendant, with a *malicious* intention, on evidence of those facts, he will be set aside." 1 *Chit. Cr. L.* 442.

To all these elementary authorities, and the cases quoted by them in support of their opinions, is superadded the unanimous opinion of the Court of King's Bench, in the case of the *King v. Edmonds*, in the 1st of Barnwell and Alderson's Rep. in the year 1821.

Challenging Jurors.

This question came before that court in the case of a trial for conspiracy. The whole subject then underwent a very thorough and laborious investigation; and the court united in the opinion, that expressions used by a juror are no cause of challenge, unless they are referred to something of personal *ill will* towards the party challenging.

But Mr. Justice Woodworth, in support of his position, that "*All* the elementary writers, with the exception of Chitty, lay down the proposition *broadly*, that if a juror has declared his opinion beforehand, it is a good cause of challenge, and quotes *Com. Law*, 138. Lord Coke, (1 *Co. on Litt.* 155-6. *Bacon*, title *Juries*, E. 5.) *Bull. N. P.* 307. 2 *Tidd*, 779, 80. 1 *Archbold*, 181, 2.

As to *Hale's Com. Law*, I can find nothing upon the subject in the page quoted, but in p. 287, he says that they are not to be such as are prepossessed or prejudiced before they hear their evidence. This no one questions. But he does not say that the expression of an opinion is a cause for *principal* challenge; so far from it, that I respectfully submit, whether I have not satisfactorily shown, that he entertained a contrary opinion.

As to Lord Coke in the page quoted, he simply proceeds to state these qualifications for a juror. 1st. He ought to be dwelling most near to the place where the question is moved. 2d. He ought to be sufficient, both for understanding and competence of estate; and 3d. He ought to be least suspicious, that is, to be indifferent as he stands unsworn, and then he is accounted in law *liber et legalis homo*; otherwise he may be challenged and not suffered to be sworn." Of this there is no question, but to infer from it that every disqualification embraced within the scope of these positions, would be cause for principal challenge, would be to confound all distinctions between principal challenges and challenges for favor. His sentiments upon the question in hand, I think I have already distinctly shown.

The next authority is Bacon, a writer whose opinion, Lord Mansfield declared, was entitled to no respect. Bacon says, "So, if he has declared his opinion touching the matter, or has been chosen an arbitrator by one side, these are principal causes of challenge." In support of this, he quotes *Co. Litt.* 158, and him alone. Now Lord Coke, as I have before shown, says no such thing, but says, "that if a juror hath been an arbitrator, chosen by the plaintiff or defendant in the same case, and have been informed of or treated of the matter, it is cause for principal challenge."

Thus the authority of Lord Bacon falls to the ground.

And even Bacon himself, in a subsequent passage, says, "It is good cause of challenge, that a juror hath a claim to the forfeiture to be caused by the conviction, or that he hath declared his opinion beforehand; yet this has been adjudged to be no cause of challenge, when it hath appeared to proceed not from *ill will*, but from a knowledge of the cause."

The next authority he quotes, is *Buller's N. P.* I will premise that this treatise was written by Buller when a young man, and is not of

Challenging Jurors.

high authority. Buller says, "that if a jurymen has declared his opinion or has been an arbitrator in the cause, it is good cause of challenge." He quotes no authority, but from his expressing himself, almost in the very words of Bacon, it is evident that he was betrayed into the error by the blunder of Bacon.

The next authority quoted, is *Tidd's Practice*. Tidd says, "that if he has been an arbitrator, or declared his opinion on either side," it is a cause of principal challenge. He also quotes no authority in support of his position, and was undoubtedly led into the error by Bacon.

The last English authority quoted by Judge Woodworth, in support of his position, is *Archbold's Crim. Law*, and I cannot find any thing in it upon the subject.

Having thus proved, that every elementary writer, including all the great standards of the law, from the earliest periods of our judicial history, down to the present time, with the exception of a few elementary writers, who it is apparent from their own showing are mistaken, that the simple expression of an opinion is not a cause for principal challenge; I will now proceed to consider the other position in support of the contrary doctrine.

It is insisted, that because a grand juror can be challenged when called to serve on a petit jury, that he is excluded, because he has already expressed an opinion.

As to the cause of this exclusion, we are not left to conjecture. Hale, in his *History of the Common Law*, p. 295, and his authority will not be questioned by any lawyer, says, "And thus much concerning trials in civil causes. As for trials in causes criminal, they have this further advantage, that regularly the accusation, as preparatory to the trial, is by a grand jury. So that as no man's interest, according to the course of the common law, is to be tried or determined without the oaths of a jury of twelve men; so no man's life is to be tried, but by the oaths of twelve men, and by the preparatory accusation or indictment by twelve men before his trial; unless in the case of an appeal at the suit of a party."

It would extend this article to too great a length, were I to state fully all the adjudged cases upon which the declarations of the elementary writers I have quoted, rest.

In the case of Peter Cook, who was tried for high treason at the Old Bailey, in the 8th of William III., he thus addressed the court, "My lords, before the jury is called, I am advised, that if any of the jury have said already, that *I am guilty*, or they *will find me guilty*, or *I shall suffer*, or will be *hanged*, or *the like*, they are not fit and proper men to be on the jury? To which, Chief Justice Trely replied, "You say right, sir, it is a good cause of challenge." Justice Rokely said, "that will be a sufficient cause if, when they come to the book, you object and be ready to prove it."

Justice Powell said, "in a civil case, it would be a good cause of challenge, if a man has given his opinion about the right, one way or another."

Challenging Jurors.

Trely, Chief Justice, further remarked, "but if any man in this panel have any *particular displeasure* to the prisoner, or be not *indifferent*, or *have declared himself so*, I do admonish and desire him to discover so much in general; for it is not fit, nor for the honor of the king's justice, that such a man should serve on the jury."

With respect to this case, which was but a hasty expression of opinion on a trial, I will remark, first, that no one of the judges said, that it would be a good cause for a *principal* challenge: that under such circumstances, it would be proper for the prisoner to challenge for *favor* and take the opinion of triers, no one will deny. And secondly, that the causes enumerated by Cook, did betray manifest *ill will* towards him, and would, therefore, come within the rule I contend for. That this was the view, which the Chief Justice took of it, is apparent from the expressions he made use of about *particular ill will* and *indifference*. And what was said by Powell, another of the judges, bore him out in it.

But Mr. Justice Woodworth, in this dearth of English authorities, has proceeded to quote American decisions. If it is a fact, that the common law of England is settled, as I contend it to be, I must protest against any attempt to overthrow it in this way. When it is doubtful, the opinion of respectable judges any where, are entitled to respect. But as the constitution of our state has declared, that "such parts of the common law as did form the law of the colony of New-York in 1776, shall be and continue the law of this state, subject to such alterations as the legislature shall make concerning the same," I must deny the right of courts of other states, or even of our own to alter it. The power is above them. It is vested in the legislature. The duty of judges is a more humble one. It is simply to follow, and not to alter the law, which is given them for their guidance.

But what are these authorities. One remark is applicable to the whole of them, and that is, that in no one of them was the distinction taken between principal challenges and challenges to favor. In every case, the tribunal sat in the double capacity of court and triers, and of course exercised the joint power of passing upon causes for principal challenge as well as challenges to favor. Now that triers may set a juror aside, if they see cause, for expressing an opinion, is not denied; but on the contrary, what I contend for is, that it is a question solely referable to them. In some other states they have lost sight of the English practice of having triers; but it is not so here. And the whole of this question is resolvable into this, whether triers are to be left in possession of their constitutional prerogative, or whether their powers are to be usurped by the courts.

The cases decided by our own courts were *certiorated* from justices of the peace, and justices here decide all questions as to the qualification of jurors. This is the first time that the question has been fairly and distinctly brought before our supreme court.

The decision of the court of oyer and terminer in the case of Barker and others, went simply to this, not that Norwood and the other jurors were competent, but that the cause stated for the challenge was not

Challenging Jurors.

a cause for principal challenge, and of course, that the court had no right to set them aside; but that if the party wished to avail themselves of that objection, they must take the opinion of triers. This they did not do, but insisted that it was in the power of the court to pass upon it; and in this they were upheld by the supreme court, and for this reason a new trial was granted.

The plain simple common sense meaning of the common law upon this subject is, that the expression of an opinion may, or may not, indicate bias. It found it impossible to lay down any general rule upon the subject, which would in all cases be salutary in its operation. The strength of the opinion, whether positive or hypothetical, the circumstances under which it was uttered, the character of the juror and a thousand other circumstances, might vary the judgment of men as to the suitableness of the juror. Circumstances might also exist, as in case of a rebellion, when it would be impossible to obtain men who had not expressed opinions. The law therefore, laid down no rule, but left each particular case to be passed upon, by the decision of indifferent men appointed by the court, called triers.

It is a fundamental principle of the common law, that the jurors shall be taken from the vicinage or neighborhood. The object was to have judges who knew most about the party. Knowledge of the case was therefore a recommendation.

One effect which must often ensue from a contrary rule, is apparent, and that is, that the most intelligent men in the community will be excluded.

In the view which Mr. Justice Woodworth has taken of this question, he seems to take it for granted that the English rule must always operate against the prisoner. But is this true? Suppose the case of one of the most respectable men in society, arraigned for an infamous offence of which he was innocent, and that the district attorney should challenge the most intelligent of the jurors, upon the ground that they had expressed an opinion that the defendant was innocent, and that the court should set them all aside. What would be the sensation of the community, at the court's turning a deaf ear to the remonstrances of the prisoner and to his complaints, that by persisting in that course, he would be thrown into the hands of ignorant men, incompetent to understand the case? And yet, if this is a good cause of challenge for the prisoner, it is for the people.

The rule which is laid down in England, and has ever been practised upon, has been in pursuance of as firm and humane an administration of criminal justice as the world ever witnessed. It has been acquiesced in and approved by our ancestors for a long series of generations; by a people ever jealous of their liberties, and who have always considered the right of trial by jury as the palladium of civil liberty. We know what have been the fruits of that system; who can fortell the consequences of innovation? A departure from it in a case in Kentucky, (Desha,) led on to the failure of justice in a most deplorable manner; so much so, that their legislature at the very threshold of the evil, found it necessary to interpose by a special act overruling the decision of the court.

U. S. Circuit Court.—Naugatuck Transportation Company v. Steamboat Rhode Island.

By a steadfast adherence to the wise institutions of our forefathers; by a firm and steady administration of the laws which they have handed down to us, under all circumstances, let who will be the victims; we shall uphold the dignity of our judicial tribunals; we shall curb the vicious, and shall protect the innocent. On the other hand the necessary consequence of vacillation, is confusion, and a failure of justice.

H. S. Circuit Court.

(*Southern District of New-York.*)

IN ADMIRALTY.

Before the Honorable SAMUEL NELSON, Circuit Judge.

ON APPEAL.

THE NAUGATUCK TRANSPORTATION COMPANY, *Libellants*, v. THE STEAMBOAT RHODE ISLAND, *Appellant*.

LAW AS TO COLLISIONS IN HELL-GATE WHEN STEAMERS ARE GOING IN THE SAME DIRECTION.

Held, under the circumstances, that a steamboat was wrong in attempting to pass a propeller in a narrow and dangerous part of Hell-Gate.

That a steamboat was wrong in attempting to pass a propeller in Hell-Gate, being responsible for knowing that in so doing there would be great danger of a collision.

Held, to be no excuse for getting into a wrong position, where nothing could be done to prevent a collision, when that position was attained through negligence.

That any vessel would be held responsible for a collision which should occur in consequence of unnecessarily attempting to pass another, struggling in the passage, there being no fault in the latter.

New allegations were filed in the circuit court in behalf of the appellants, for the purpose of bringing under consideration material testimony showing bad navigation by the propeller, which was supposed not to have been allowed weight in the District Court, for the reason that the answer was held not to be specific enough to admit of its application. (See *Opinion of Dis. Court*, 6 Leg. Ob. p. 15.)

The collision in question took place during daylight, about abreast of Hallett's Point, between the point and Hogsback, and nearer the former than the latter. The tide was at its strongest ebb; both boats were from New-York, bound to the eastward. While the Rhode Island was passing Flood-rock, the propeller had taken her sheer off the Point, about midway across, and was taking a direction to the southward of the Pot, with the tide on her larboard bow and sagging her to the southward. The Rhode Island struck the tide at Hallett's Point, and was carried off to the northward, so as to bring her into the propeller a little abaft of midships. As soon as the Rhode Island

U. S. Circuit Court.—Naukatuck Transportation Company v. Steamboat Rhode Island.

struck the tide, her engine was slowed and stopped ; and when striking the propeller, it was at rest and she beginning to straighten in the tide.

The case came up on cross appeals. The libellants appealing from the decree below, as to the disallowance of certain damages, (which yet remains open.) The claimants appealing generally.

E. H. Owen and *F. B. Cutting*, for the libellants.

A. Hamilton and *W. Q. Morton*, for the Rhode Island.

For the libellant it was contended : (1.) That the propeller was in her usual course, and being the head boat, was not bound to notice a boat coming behind. (2.) That if there was not room for the Rhode Island to pass without requiring the propeller to do anything, then the Rhode Island had no right to pass. (3.) If room, then the collision must have been caused by faulty navigation of the Rhode Island, for the propeller did nothing. (4.) If the propeller was bound to have done something to avoid a collision, it was not until the last moment, and if then in the hurry of the emergency, she omitted doing what might have prevented the collision, the omission was caused by the improper navigation of the Rhode Island, which put her in a position where no sufficient time was afforded. (5.) That the proof did not make out a usage for propellers, of her power and size, to navigate to the North Shore, but the reverse. (6.) If such usage did exist, the Rhode Island saw that the propeller was departing from it, and was bound to have stopped or slowed sooner, to have let the propeller go through. (7.) That if the Rhode Island could not have slowed or stopped with safety after passing Flood-rock, she should have done so before reaching there.

The following authorities were cited for the libellant. 3 Hagg. Ad. Rep. 176, *Girolamo*. 1 W. Rob. 45, *Protector*. 3 Kent's Com. 230. 233. 1 Dod. Rep. 467, *Neptune*. 2 W. Rob. 270, *James Watt*. Pardessus, Caus. Droit du Commerce, tome 3, p. 95, sec. 653. Emerigon Ch. 12.

The following points were made for the Rhode Island :—

That the court would notice judicially and under the proofs, that the passage of Hell-Gate constituted waters of the United States, was a public thoroughfare of a peculiar and extraordinary character, and to be navigated upon the understanding, that all general rules are to give way under its emergencies, and wherein mutual accommodation always has been the great law. That it was very questionable, whether it was within the power of the state to prescribe regulations for its navigation.

That the state law being adapted to ordinary river navigation, had no direct application to this passage ; yet might be noticed as suggesting a navigation which condemns the propeller in the broad assertion, that she was navigated wholly irrespective of the fact, whether she was unnecessarily obstructing the Rhode Island, and " paid no

U. S. Circuit Court.—Naugatuck Transportation Company v. Steamboat Rhode Island.

attention to her." 4 N. Y. Legal Obs. 453. U. S. *Dan Jackson*, 1 N. Y. Rev. Stat. 3d edit. p. 86.

That all vessels have the right to use this passage by going through. None have the right to obstruct it by unnecessarily anchoring, or in any other way impeding the public in the right of passing through. 1 Howard's U. S. Rep. 92, *Stroud v. Foster*.

That all vessels entering upon the navigation of Hell-Gate, are bound to the observance of the rule of "mutual accommodation;" that the right of the public being to pass through, not to stop or obstruct the passing of others—any vessel voluntarily coming into the Gate, with power inadequate for contending with the tide, is bound to use extraordinary care and precaution in the observance of the rule.

That the libel places the right to recover, upon the grounds: (1.) That the propeller was on her usual and lawful course. (2.) That this course left the Rhode Island room to pass her. (3.) That the Rhode Island had the right to pass through at the time she attempted to do so, and had power and way enough for the purpose. (4.) That the collision was caused by the Rhode Island not using properly the facilities afforded her.

That on the proofs it appeared, that the propeller came into the gate with power inadequate for passing through, that she was "hanging" in the gate, and although making little headway, was perfectly manageable so as to be able with ease and safety to sag from side to side of the passage, and leave it open for other steamboats passing through. That during similar states of the tide, propellers of her power, had navigated in this manner until the tide slackened sufficiently to enable them to go through.

That under the proofs it was not pretended that any navigation of the propeller would have left room for the Rhode Island to have passed her, on the north or larboard side; but that the navigation of the propeller towards the south or nearer the south than the north shore, did not leave room enough for the Rhode Island to pass her, on her right or starboard side.

That the case set up by the libel was not made out by the proofs, and inasmuch as the libel had conceded the right of the Rhode Island to pass, and averred that room had been afforded, it could not afterwards be set up, that the Rhode Island had no right to pass, because there was not room enough, or that she was bound to have stopped below and waited, &c. That the decree must be "*secundum allegata et probata*."

That it is a well settled rule of admiralty courts, both in England and in this country, that to recover *entire* damages for a collision, it must appear by a preponderance of testimony, that the same was occasioned without fault on the part of the libellant, but through fault on the part of the vessel charged.

If it appear that the libelling vessel committed a fault, her claim to entire damage fails; or if the testimony is equally balanced, the libel will be dismissed. *The Ligo*, 2 Haggard, Adm. Rep. 360. *The Catharine of Dover*, 2 Haggard, Adm. Rep. 154. *The Brig*

U. S. Circuit Court.—Naugatuck Transportation Company v. Steamer Rhode Island.

Emily, U. S. Dist. and Circuit Court of New-York, on appeal, 6 Leg. Obs. 340. *The Ship Northumberland*, U. S. Dist. Court, 1847. 5 How. U. S. Rep. 501, *Waring v. Clark*.

That in a court of common law, whenever the evidence discloses fault on the part of the plaintiff, suing for damages caused by a collision, the plaintiff will be non-suited. In Admiralty, however, he is permitted "*ex equitate*," to proceed farther, and if able to prove culpable fault on the defending vessel, an apportionment of the damages may be obtained. 2 N. Y. Leg. Obs. 67, *North America*. 6 Leg. Obs. 201, *Bay State*. 3 Hagg. Ad. Rep. 26, *Monarch*. 1 Howard's U. S. Rep. 92, *Strout v. Foster*.

That the clear preponderating weight of evidence fixed upon the propeller the fault which caused the collision, viz: after having broken her shear, and obtained full and perfect command of herself, her helm was deliberately ported, so as to bring the tide on her larboard bow, which sagged her towards the south, at a time when she knew that the Rhode Island was under full headway, had passed or was passing Flood Rock, and within thirty seconds must take a sheer at Hallet's Point, within the probable scope of which, those in the propeller admit they knew they must bring themselves, if continuing their course.

It being admitted by the libellants that they were aware of the approach and passing of them by the Rhode Island, the ground contended for obviously is, that they claim the right to navigate, under the circumstances in question, as though the Rhode Island had not been in the *gate at all*—in other words, that the public was bound to know the usual course of the Naugatuck, and so to navigate Hell Gate, when she was in it, as not to require her to do any thing towards leaving the passage open, or they to keep out of the gate until she was through.

That the proofs show that the course assumed by the propeller when porting her helm, tended effectually to close the passage, and involves, if the court sustain the grounds assumed by them, that with the half of the channel open to them on the north, they yet have the right to occupy a portion of the south, beyond the line of the middle, and thus gradually shut the south passage to boats which can only take this passage from the *necessities incident to, and inseparable from the navigation*.

Taken in connection with the ground contended for by the libellants' counsel in the court below, that the propeller was nearly at a dead stand still, "*hanging in the gate*," this claim then rests substantially upon the extraordinary assumption, of the right to anchor in, and obstruct this notoriously dangerous and narrow public passage: clearly within the principles of the case of 1 Howard's S. C. Rep. 92. *Stroud v. Foster*.

That the allegations of the libel in connexion with the proofs show, that with admitted inability to pass through, they place themselves upon the legal right to have done nothing.

That the case on the part of the libellents rested upon the assumption,

U. S. Circuit Court.—Naugatuck Transportation Company v. Steamboat Rhode Island.

that they were required to do nothing, and that the Rhode Island was bound to do everything, and also to have exercised something like prophetic sagacity in guarding against the possibility of finding the Naugatuck in the Gate, and to anticipate that she would port her helm and sag towards Hallett's Point, while she, the Rhode Island, was between Flood Rock and the Point.

That the clear weight of evidence demonstrated that it was in the power of the propeller, to have done every thing effectual for avoiding the collision. That this could have been done with perfect safety and ease to herself, and really without any loss of time, (if time was an object.) That the necessity of doing something, was seen by them abundantly early for the purpose of acting properly.

That it also appeared by the weight of evidence on both sides, that the larger is the most helpless of the two boats, and cannot with safety sag from side to side, and is limited to one mode of passing through this part of the Gate.

That the law of Hell-Gate, "*mutual accommodation*," was alone compatible with its safe navigation, and but for its adoption thousands of collisions would have occurred, and to shake its observance now would be disastrous to the public interests, and to life and property. That great care and skill were applied in the navigation of the Rhode Island. (*Opinion of the Court, ante* 16.) And the clear weight of the testimony of pilots of steamboats, and competent masters showed that if on board they would have navigated her precisely as was done.

That the usual and proper course for propellers going through Hell Gate, on ebb tide, after striking tide at Hallett's Point, was on the north side or shore.

That the Naugatuck at the time of collision was not on such usual and proper course, but about abreast of Hallett's Point, and had edged over nearer to the south than the north shore, heading south of Pot Rock, intending to take, and in a direction to take, the south shore inside of Pot Rock.

That the invariable and only proper and safe course for large steamboats on ebb tide is to pass near Flood Rock, and then, turning so as to head the tide, shave Hallett's point as close as possible in a direction to northward of Pot Rock.

That the Rhode Island, on the occasion in question, was taking such invariable course, and was being successfully navigated on such course. The master, first and second pilot, and wheelman being at the wheel together engaged in steering the vessel, and looking out for vessels or other obstructions.

That the libellants were estopped by their own allegation in the libel, (Art. 6,) "that she had room enough and might have cleared the Naugatuck, and passed her without injury," from imputing any blame or fault to the Rhode Island in attempting to pass the Naugatuck, especially as it was alleged by the libel, that the attempt was made under favorable circumstances, such as "a sufficient head of steam, good headway," &c.

That the Rhode Island was entirely justifiable in proceeding on her

U. S. Circuit Court.—Naugatuck Transportation Company v. Steamboat Rhode Island.

way through the gate. Because, until after passing Flood Rock, the Naugatuck appeared to be (as she was supposed to be by those on the Rhode Island) in the usual course of propellers, going through on the north side. That the Rhode Island had a right to calculate upon her taking such course, from the known custom of propellers, and further, that when the Naugatuck found the steamboat approaching her, those on board of her knowing the course of steamboats, would so direct their boat as to allow the Rhode Island to pass on the only side proper for her to pass.

That from the evidence, no prudent or discreet master of steamboat would, under the circumstances, have felt himself bound to consider the Naugatuck an obstruction or obstacle in the way, nor would he have apprehended a collision with her until after he had struck the tide at Hallett's Point.

That after having passed Flood Rock, and when between that and Hallett's Point it was first discovered that propeller was sagging to southward, the navigation adopted on board the Rhode Island was such as a skilful and competent master would have pursued. That she went as close to Hallett's Point as she had ever been, and "closer than it is considered safe to navigate with boats of her size."

To have attempted passing to northward of Naugatuck would have involved such imminent danger to Rhode Island as only to be ventured in the last extremity ;—to have turned round, would have been at that time and in her then position, a most dangerous experiment, and would have, in addition involved the danger of a collision.

To stop or slow the boat before striking the tide, would, according to the weight of testimony, have been an experiment never *resorted to*, and of a most doubtful and dangerous character.

That it was established by their own witnesses, that the Naugatuck was under perfect command, so far as to be able to alter her course, to the north or south, at pleasure ; that she had broken her shear after striking the tide, and that nothing but the will of those on board of her prevented her from sagging to northward and leaving the passage open to the Rhode Island.

That the Rhode Island claimed only the right to pass through Hell Gate in common with other vessels ; but that right of passage, owing to the difficulties of the navigation, must be exercised, as is notorious to all, in a particular manner, or it does not exist ; and the strait is effectually barred and closed to her and other vessels of her class.

That those navigating the Naugatuck, if possessing the competent skill, were bound to know that there was but one course for the Rhode Island to take in passing ; and if they have the right to sag over to the south at the time and in the manner it was attempted, with their propeller at a stand still, or nearly so, on the ground that they had a right to navigate as they pleased, irrespective of other vessels ; it amounted to claiming the right of stopping the passage of boats of the class of the Rhode Island, for so long a space as the Naugatuck's want of power might make her stationary in the tide way.

That this right was denied ; and on the contrary it was submitted

U. S. Circuit Court.—*Naugatuck Transportation Company v. Steamboat Rhode Island.*

that, where a vessel from defect of power is liable to be brought to a stand still, in a dangerous and narrow passage, so as to impair, hinder or obstruct the right of passage enjoyed by other vessels in common with herself, the burthen is imposed of exercising special care and vigilance in avoiding other vessels following her, and that when, as in this case, a course is open to her, which is usually adopted by vessels of her class, and by which all danger is avoided, she is bound to take such usual course.

That the libellants allege that they were bound to do nothing, and do not set up in their libel that they did anything. They moreover prove on the hearing, that they apprehended a collision some time before it took place. Yet under these circumstances refusing to do anything till it was too late to aid the other in avoiding them, and standing upon what they imagined to be their strict legal rights, at such a time and place, they actually invited a collision.

BY THE COURT—NELSON, *Circuit Judge*.—The preponderance of the evidence in my opinion is clear, that the Rhode Island was in fault in attempting to pass the Naugatuck in the gate, regarding her position at the time, and the course she was pursuing through that narrow and dangerous passage.

Notwithstanding some evidence to the contrary, the weight of it is not to be mistaken, that the Naugatuck was in her usual course, and not only so, as near as practicable, in the usual course taken by vessels of her size and power in passing the gate; that is, heading towards the *Pot*—some of them pass south and some north of it: in this instance, the Naugatuck was heading a little south of it, and apparently intending to take that course. But whether intending to pass north or south of it, in my judgment, makes no difference. She had just straightened up in the stream after the shear on encountering the force of the ebb tide and was about in the middle of the channel.

Under these circumstances, the Rhode Island was clearly in the wrong in attempting to pass her, as it could not be done without great danger of a collision.

The evidence shows, that the Rhode Island always shears about to the middle of the channel, between the Point and Hog's Back, in doubling the point, in the then state of the tide, which would of necessity produce, or would in all probability produce the disaster that actually happened.

The pretext set up for exposing the Naugatuck to the hazard, is, that the slowing or stopping the Rhode Island after she had passed Flood Rock, would greatly endanger her own safety and the safety of the lives of the passengers. The answer is, if this be admitted, it was her own fault that she was brought into the dilemma. The Naugatuck was seen in time to have avoided it; neglecting to avoid it, subjects the Rhode Island to all the consequences that followed.

Indeed, upon the evidence, I should feel bound to hold any vessel responsible for a collision that occurred in attempting to pass another while struggling in this dangerous strait; there being no fault on the

N. Y. Supreme Court.—McCormick v. Graves.

part of the leading vessel. It cannot be done without imminent peril of a collision.

I am satisfied, therefore, that the decree of the court below is right and should be affirmed.

N. Y. Supreme Court.

[*Chenango, September General Term.*]

Before the Honorable the Justices of the Sixth Judicial District of the Supreme Court.

JACOB MCCORMICK v. RASWELL GRAVES.

DEMURRER TO PLEA—OLD PLEADINGS SUBJECT TO RULES OF CODE.

A plea to an action of debt on bond that one W. H. G., was at the date of the bond indebted to the defendant in \$4,000, and that the bond mentioned in the declaration and a mortgage were executed and put into his hands by the defendant, upon the consideration, express agreement and understanding, between the defendant and said W. H. G., that neither the bond nor mortgage should be delivered to the plaintiff, until after said W. H. G. should procure and deliver to the defendant, good notes to secure the sum of money mentioned in the bond, or a good bond and mortgage to secure a like amount to be approved by this defendant, nor until after the said W. H. G., should deliver to the defendant a good and sufficient deed of conveyance of certain lands described in the mortgage, by which they should be conveyed to the defendant, and negating the delivery of any such note, bond and mortgage, and deed of conveyance.—*Held*, bad on special demurrer.

Where a demurrer to a special plea was put in before the code of procedure, raising objections of form which were good when the demurrer was interposed:—*Held*, on argument after the first of July, that such objections could not be noticed as the code applies its healing properties to all causes of demurrer which are matters of form, and that it applies to issues of law joined before its enactment, as well as to those joined afterwards.

DEBT on bond for \$2,000. The declaration was in the usual form, the defendant pleaded as follows:—

And the said defendant, by leave of the court here for this purpose, had and obtained, according to the form of the statute in such case made and provided, for a further plea in this behalf says, that the said plaintiff, his action aforesaid against the said defendant, ought not to have or maintain, because the said defendant says, that one William H. Gregory, on the day of the date of the said supposed writing obligatory, was justly indebted to this defendant, in the sum of four thousand dollars, of lawful money of the United States of America, and the said supposed writing obligatory in the said declaration of the said plaintiff, mentioned together with a certain mortgage made by the said defendant as the party thereto, of the first part to the said plaintiff, as the party thereto of the said second part, as further collateral security for the payment of the money mentioned in the condition of the said supposed writing obligatory, of and upon certain real estate, situate in Ithaca, in the county of Tompkins, in the state of New-York, were executed and put into the hands of the said William H. Gregory, by this defendant, at the special instance and re-

quest of the said William H. Gregory, and on and upon the consideration, and with and upon the express agreement and understanding, by and between the said defendant and the said William H. Gregory, that neither the said supposed writing obligatory nor the said mortgage should be delivered to the said plaintiff until after the said William H. Gregory should procure and deliver, or cause to be delivered to the said defendant, one or more good promissory note or notes, to be approved of and accepted by the said defendant, to secure said defendant the same amount and sum of money, mentioned in the condition of the said supposed writing obligatory, or a good bond and mortgage, to secure a like amount, or sum of money, to be approved of and accepted by said defendant, the said note or notes, or the said bond and mortgage, which should be so approved of and accepted by the said defendant, and the money to be collected thereon to be held, owned, collected and used as the property of him, said defendant, nor until he, the said William H. Gregory, should deliver or cause to be delivered to the said defendant, a good and sufficient deed of conveyance, by which the said land and premises, mentioned and described in said mortgage, should be duly conveyed to the said defendant, and this defendant avers that the said William H. Gregory hath not at any time delivered, or caused to be delivered to this defendant, any such promissory note or notes, as aforesaid, nor any such bond and mortgage as aforesaid, nor any such deed of conveyance as aforesaid, and this the said defendant is ready to verify: wherefore he prays judgment, if the said plaintiff ought to have or maintain his aforesaid action thereof against him, &c.

Demurrer to plea assigning the following causes:—

1st. It does not appear in and by the said plea, that the said defendant was not indebted to the said plaintiff at the date of the said bond in the full amount of the condition thereof, nor does it appear in and by the said plea, that the debt claimed in and by the said declaration, is not now due and owing to the said plaintiff from the said defendant.

2d. It does not appear in and by the said plea, that the bond declared upon, was delivered as an escrow, nor that it was not delivered in due form of law to the plaintiff to secure the amount due by the condition thereof.

3d. If the said second plea shall be adjudged to be a plea, that the said bond was delivered as an escrow, then the same is insufficient and informal, because it does not confess the cause of action, and because it amounts to the general issue of *non est factum*, and is therefore bad.

4th. That it appears in and by the said plea, that the said bond was made as and for a part of the consideration or purchase monies of certain land, and it then alleges the non-delivery of the deed of conveyance of said land to the defendant, as a defence to this action on said bond, but it does not appear that the title to said land has failed or was invalid in law at the time the said bond was made and delivered, or at any time since, nor but that the said land is now in

N. Y. Supreme Court.—McCormick v. Graves.

the possession of the said defendant, nor but that the said defendant is the owner thereof in fee, nor that he, the said defendant, has been evicted therefrom, and also that the said plea is in other respects uncertain, informal and insufficient. Joinder in demurrer.

The cause came on for argument on the demurrer, at the Chenango General Term, on the first Monday of September, 1848.

P. Y. Cutler, for plaintiff.

1st. The plea is bad, because it amounts to the general issue. *Brown v. Archer*, 1 Hill, 266. *Underwood v. Campbell*, 13 Wend. 78. *Halsted v. Lyon*, 221 McLean, 226. *Cooke v. Scott*, 1 Gilman, 333. It may perhaps be regarded as equivalent to a plea of never indebted. This would be clearly bad. *Jacob v. Fisher*, Manning, Granger & Scott, 178. That a deed was delivered as an escrow may be proved under a plea of *non est factum*. 1 Chitty's Pl. 485, and cases cited 1 Barn. & Adolph. 426. 4 East, 94.

2d. It is not a plea that the bond was delivered as an escrow, because it lacks the averment that it was delivered as an escrow to Gregory, to be kept by him, &c., but it avers instead thereof, that it was delivered at Gregory's request and upon an agreement, &c. It does not contain the averment, that the writing was, on failure of the condition, to be discharged, annulled and held for nothing. It tenders an immaterial issue. 3 Chitty's Pl. 962.

3d. The plea professes to be a plea of confession and avoidance, every such plea, to be good, must distinctly confess the cause of action stated in the declaration, but this plea does not confess the cause of action. *Conger v. Johnson*, 2 Denio, 96. *Halsted v. Lyon*, 2 McLean, 226. *The Commercial Bank of Buffalo v. Shanon*, 2 Denio, 105.

4th. The plea states simply that one Gregory, (who is not averred to be in any way connected with the plaintiff as agent or otherwise,) was indebted to the defendant in the sum of \$4,000, that the defendant delivered the bond declared on, to Gregory upon an agreement which Gregory has not fulfilled.

Now would it be a bar, if it had averred a delivery to the plaintiff upon an agreement he had not fulfilled. *Whiting v. Lewis*, 21 Wend. 131. *Giles v. Williams*, 3 Ala. R. 316. But if it would, how can the fact that a third party has not kept his agreement with the defendant, bar the plaintiff. It does not aver that the bond was made without consideration, or that the consideration has failed, but on the contrary avers a good consideration. It does not pretend that the defendant is not indebted to the plaintiff in the sum mentioned in the condition of the bond, but simply avers that defendant is not indebted to Gregory. *Muzzy v. Shattuck*, 1 Denio, 233. *Whiting v. Lewis*, 21 Wend. 131, and cases cited by counsel and court. *Dremer v. Boyn*, 5 Pike, 497.

The plea should have contained a positive averment, that the title was bad, by showing a clear and indisputable, paramount title in a third person. 5 Watts and Sug. 51. The plea does not aver that the plaintiff had any agency in the transaction at all. To avoid a bond

N. Y. Supreme Court.—McCormick v. Graves.

on the ground that it was fraudulently obtained, it should appear that the obligee had an agency in this alleged fraud. *Jennins v. Howard*, 6 Blacks. 240.

Here was a mere undertaking on one side by Gregory, and an undertaking on the other by defendant. In such case, it is well settled that both parties may have an action. *Close v. Miller*, 10 Johns. Rep. 90.

The plea does not pretend that the contract has been rescinded. It merely states a case of mutual non-performance. 10 Johns. R. 90, *Post v. Shirly*; 5 Black. R. 430, *Giles v. Williams*, 316. It is bad because it does not aver that the contract has been rescinded, or that the purchaser has lost possession. The averment is that Gregory agreed to "cause to be delivered to the defendant a good and sufficient deed of conveyance," &c. This means any good deed of the land. The plea then avers that he has failed to deliver "any such deed of conveyance as aforesaid," i. e. that Gregory did not comply with the contract, but it does not show how he failed to comply. This plea is not so strong as that in *Whiting v. Lewis*, 21 Wend. 131, because it does not aver title out of Gregory or out of plaintiff, nor that they, or either of them, had not good title to the land. It simply avers that Gregory did not furnish "such deed" as he covenanted to furnish. To make it good it should have gone farther and shown, at least, a failure of title, or an eviction, either that he obtained no estate or interest whatever under the conveyance, or that the title was defective, stating the defects. *Tallmadge v. Waltis*, 25 Wend. 107.

M. T. Reynolds, contra.

1st. The plea is in form and substance a special *non est factum*; that the bond was delivered as an escrow and under a condition not performed.

2d. The defendant in debt on bond may plead specially any matter which might be given in evidence under *non est factum*.

It has been held that this defence must be specially pleaded, 2 Hayward, 146, 327; 2 Mass. 452.

Per Curia, SHANKLAND, J.—To debt on bond, in the usual form; the defendant pleads in bar, that one William H. Gregory, on the day of the date of the bond, was indebted to the defendant in the sum of \$4000, and that the bond sued on, and a mortgage collateral thereto, was executed and put into the hands of said Gregory, by the defendant, at the special instance and request of the said Gregory, upon the express consideration, agreement and understanding, by and between defendant and Gregory, that said bond and mortgage should not be delivered to the said plaintiff until after said Gregory should procure and deliver to defendant notes or bonds and mortgage, or a deed of the lands covered by said mortgage, to secure defendant the \$4000, and the plea then avers that Gregory never did either of those things. The plaintiff demurred to the plea and assigns several causes thereon, but as the code of procedure applies its healing properties to all the

N. Y. Supreme Court.—*The People v. Martin and Martin.*

causes of the demurrer, which are matters of form, I propose to examine after matters of substance only. I see no connexion between the debt due from Gregory to the defendant, and the making of the bond in question. Nor does the plea deny the indebtedness to the plaintiff acknowledged by the bond, nor but that the defendant delivered it to the plaintiff for the indebtedness aforesaid.

In short, the matters set up in the plea, do not constitute an answer to the declaration in matter of substance; the agreement with Gregory and his breach thereof, is no excuse in law for the defendant's breach of his agreement with the plaintiff.

There should be judgment for the plaintiff with leave to the defendant to amend upon payment of costs. If he has a good defence he can plead it in a manner available in law.

Before the Honorable J. W. EDMONDS, one of the Justices of the Supreme Court of the State of New-York.

AT CHAMBERS.

THE PEOPLE V. MARY MARTIN and CAROLINE MARTIN.—29 November, 1848.

On *habeas corpus*, how far the court or officer granting it, are bound by the return, or may go behind it.

In criminal cases where an indictment has been found, he cannot go behind the indictment, because there are no means of ascertaining upon what the indictment was founded.

But on a commitment before indictment, the whole question of guilt or innocence, is open for examination on the return to the writ of *habeas corpus*, and the inquiry is not necessarily confined to an examination of the original depositions.

In such cases, under our Revised Statutes, the proceedings on a *habeas corpus* are in the nature of an appeal from the decision of the committing magistrate.

On the return to a writ of *habeas corpus* sued out for the prisoners, it appeared they were detained on a full warrant of commitment for trial on a charge of grand larceny issued by one of the police magistrates of the city.

They filed their allegations in answer to the return, setting up that they were arrested without warrant by a person not a police officer. That when taken before the magistrate, he refused to examine the complainant in their presence, though they demanded it and committed them for trial. The allegations also averred the innocence of the accused, and that the money they were accused of stealing, was given to them under pretence of teaching French, but really for purposes of seduction.

On filing these allegations, *McKeon*, district attorney, and *Galbraith*, for the prosecution, insisted that the warrant of commitment being regular on its face, was conclusive on *habeas corpus*, and no inquiry could extend behind it.

A. Nash, contra.

And now at this day, January 8, 1849, EDMONDS, J., delivered his opinion.—It is claimed in this case, in behalf of the prosecution, that the commitment of the magistrate is conclusive upon me, and that I have no right on this return to look beyond the question of its regularity or that if I do look beyond it, I can look only at the depositions taken before the magistrate.

I had understood the law otherwise, and have always supposed that by means of this writ, the officers who were authorized to allow it, were by its very nature clothed with a certain revisory power over those by whose mandate any person might be restrained of his liberty.

The earnest manner in which, however, the contrary doctrine was pressed upon my attention, the construction which has been put upon the decision of this court in the McLeod case, and the fact that the legislature has once at least, (by depriving the judges of the superior tribunals, of the power of revising the action of the committing magistrate in fixing the amount of bail,) departed from the great principles of the *habeas corpus* law, have caused me to hesitate in yielding to my first impressions, which I confess were rather the fruits of the reading of my early boyhood than of riper years, and have induced me, at some labor, to review the law on this subject at large. I, by no means, regret this, though it has been somewhat difficult to find among the pressing nature of my other avocations, time enough to devote to a task involving so extended an examination as I have given the subject, for an accurate and intimate knowledge of the properties of this great instrument of personal liberty, the writ of *habeas corpus*, cannot but be valuable to every citizen.

The language of our statute, “of writs of *habeas corpus* and *certiorari*, when issued to inquire into the cause of detention,” (2 R. S. 563,) is not sufficiently definitive to leave no room for doubt on this question. Every person committed, detained, confined or restrained of his liberty under any pretence whatever, (except in a few enumerated cases,) may, it is true, prosecute this writ. On the return of the writ, the facts contained in the return may be examined into as well as the cause of the confinement, and if no legal cause be shown therefor, the party may be discharged. (*Ib.* 567.) Upon these enactments, for they are not new, it has been held that the officer allowing the writ out of court could not go behind the return. To remedy that, the 50 sec., was enacted, (*Ib.* 569,) giving to the imprisoned party, the power to deny any material fact set forth in the return or to allege any fact to show the detention illegal or that the party was entitled to his discharge, whereupon, the officer may hear such allegations and proofs, as may be produced in support of the detention or against the same, and dispose of the party as the justice of the case may require.

This language is broad enough to confer upon the officer the most ample power on *habeas corpus*, to inquire into the guilt or innocence of the party as to the offence charged, for on that, if his detention be not illegal, he may be entitled to his discharge. But it has been held

that on *habeas corpus*, the court or officer will not try the question of guilt or innocence. 1 *Ch. Cr. L.* 130.

And Cowen, J., in McLeod's case, (1 *Hill R.* 394,) is very explicit in laying down the same doctrine, and he declares that the provision of the statute which I have quoted, would be satisfied by being limited to the lawfulness of the authority under which the prisoner is detained, without being extended to the force of the evidence upon which the authority was exerted. (*Ibid*, 404.)

And in the statute to which I have referred, I mean the police law relative to this city, the legislature have gone some ways to sanction the same doctrine. So that with this positive enactment in the police law, and this construction of the *habeas corpus* act, the power of the committing magistrate as to the question of guilt or innocence, and as to the amount of bail to be required, would become absolute, irreversible and above all review. A power of this extent would ride over all the courts in the land, and become perfectly despotic, if it was not subject to review and inspection.

I have already had practical evidence of the result of such a state of the law. In one case brought before me, the committing magistrate had refused to let a party to bail, who was accused merely of a breach of the peace; thus arbitrarily, and as it was insisted before me, without the possibility of review or correction, putting assault and battery upon an equal footing with murder. In another case of assault and battery, the magistrate had fixed the amount of bail at some \$16,000, and I was admonished that under that police law, I incurred the danger of committing a misdemeanor, if I reduced the amount. So that I was placed in the dilemma of running the hazard of an indictment or of violating my oath of office and the constitution, which forbids excessive bail. Of course I incurred the hazard, but not without some reflection upon the character of legislation which could thus jeopard personal liberty, and at the same time place a judge of the highest criminal court in the state, in such a position, that he could carry out the constitution only by incurring the hazard of becoming himself a criminal at his own bar.

Such cases must and will occur again, if the law is such as to sanction them, and I have therefore been the more anxious in my researches, in order to ascertain with certainty, whether such is, in fact, the state of the law among us.

I have already intimated that the language of Mr. Justice Cowen, in McLeod's case, was broad enough to sustain this doctrine, and if that was an authoritative decision of the court upon the point, I should be bound to obey it as the law of the land until it should be reversed by an appellate tribunal or altered by the legislature. But fortunately that language is entitled to no such binding force. That point was not before the court. The *dictum* was *obiter*. The question raised there was, whether, *after indictment*, the court on *habeas corpus*, would entertain the question of guilt or innocence, and on that question the authorities had been very uniform, that it would not, and for very plain

and simple reasons, that as the testimony before the grand jury would not be written and could not be looked into, the court or officer on the *habeas corpus*, could not ascertain on what evidence the grand jury had acted and could not entertain the question without receiving precisely the same testimony, which the jury would be obliged to receive on the trial, and thus, in fact, usurp the province of the jury. Hence it had been the practice of the English courts and our own, which was followed in the McLeod case, not to look into this question of guilt or innocence on *habeas corpus*, after indictment. But not so where the party was committed by the magistrate, nor even where he was committed on the coroner's inquest, because there were depositions which could be looked into. But even to this rule there were exceptions. *Bac. Abr. Hab. Cor. B.* sec. 11, says, that the court will sometimes after indictment examine the circumstances, and he cites the case of one indicted for piracy who was bailed because it appeared that it was the prosecutor himself who had committed the offence. In *Rex v. Crips*, referred to in Cunningham's Rep. 96, the party was bailed because of a mistake of the person of the party accused.

I do not, however, understand the rule, whether it has few or many exceptions, to deny the power after indictment to look beyond the commitment. It merely says, that the court will not, not that it cannot do so, and for very good reasons, as I have already mentioned. For equally good reasons it may and does do so, as is shown by the many cases where after delay to bring on the trial of an indictment, the party has been discharged or bailed.

This rule, however stringent it may be held to be after indictment found, is by no means so, where the party is detained merely on the warrant of the committing magistrate. Ch. J. Marshall recognised this distinction in Burr's case. In *Benoit's case*, 1 Martin's Lou. R. 142, the court looked into the testimony to see whether an illogical conclusion had not been drawn. Chitty lays down the rule, 1 Cr. Law, 119, where a person committed is advised that his commitment is illegal he may obtain relief by *habeas corpus*, and the proceedings thereon, *which is the only course of proceeding*. Indeed, wherever a person is restrained of his liberty, by being confined, whether it be for a civil or criminal cause, and it is apprehended that the imprisonment is illegal, he may regularly, by *habeas corpus*, have his body and the proceedings under which he is detained, removed to some superior jurisdiction having authority to examine the legality of the commitment, and upon the return to the writ the court are to examine and determine the legality of such commitment and do what to justice shall appertain in delivering, bailing or remanding him.

And he adds, (page 129,) if the court ascertain there was no pretence for imputing to the prisoner any indictable offence they will discharge him. Even though the commitment be regular, the court will examine the proceedings and if the evidence appear altogether insufficient, will admit him to bail, for the court will rather look to the de-

positions which contain the evidence than to the commitment in which the justice may have come to a false conclusion.

Such is the English rule, thus stated by this respectable writer and sustained by abundant authority, and it necessarily confers on this writ an appellate attribute and upon the court or officer to whom it is returned power to review the proceedings of the inferior magistrate on whose warrant a person may be committed.

The rule is the same in this country, and no stronger evidence of it need be given than the view which the U. S. Supreme Court have taken of it.

That court has, under the constitution, original jurisdiction only in cases affecting ambassadors and the like, and those in which a state shall be a party. In all other cases it has only appellate power. The judiciary act conferred upon it, and upon the judges thereof, power to issue writs of habeas corpus—a power which they could not exercise unless the writ had properly an appellate character.

The question has frequently been before that court and its appellate character has been repeatedly maintained. *Bollman and Swartwout*, 4 Cranch, 75; *Ex parte Kearney*, 7 Wheat. 42; *Ex parte Watkins*, 7 Peters, 200, (where Ch. J. Marshall says it is in the nature of a writ of error which brings up the body with the cause of commitment); *Ex parte Burford*, 3 Cranch, 447; *In the matter of Metzger*, 5 Howard, 176; *Ex parte Barry*, 2 Howard, 65. It is an essential criterion of appellate jurisdiction that it revises and corrects the proceedings in a cause already instituted, and does not create the cause. *Marbury v. Madison*, 1 Cranch, 175.

The U. S. Supreme Court has no common law jurisdiction. It owes all its powers to the constitution and the statutes, and so far as the habeas corpus is concerned, uses the writ only as it ministers to its appellate jurisdiction.

Our Supreme Court is, however, different in this respect. It has all the common law powers of the King's Bench, in which this remedial writ has been one of its instruments of administering justice for very many years, and the judges out of court have the same authority conferred on them by statute.

Under the common law powers it has always been competent for the court in term to inquire in the broadest manner into the legality of the imprisonment and for that purpose to go behind the return. The books are full of such cases, and the refusal of the king or the lords in council, or in other words that courts giving to the warrant of the king and the star chamber the same binding and controlling force which in this case is claimed for the warrant of a police justice, was a prolific source of trouble in the reign of Charles I., drew on a parliamentary inquiry and produced the *petition of right*, 3 Car. 1, which recites this illegal judgment and enacts that no freeman shall be so imprisoned and detained. 3 Bl. Com. 134.

The revision of our habeas corpus law in 1813, extended its provisions to persons detained on civil process, while the English statute, from which ours had been copied, confined it to criminal cases.

Our court in *Cable v. Cooper*, 15 J. R. 152, upon this new provision of the statute, gave a similar construction and denied to an officer or judge acting upon a habeas corpus out of term the power of looking beyond the return. This decision was made in January, 1818, and the legislature, with commendable promptness and in close imitation of the action which as before mentioned, "produced the petition of right," in the same session passed a law correcting that judgment.

The act passed April 21, 1818, recites that "Whereas doubts are also entertained whether returns made to writs of *habeas corpus* issued under said act are traversable or examinable by facts *dehors* the returns," and enacts that the officer before whom a prisoner is brought shall examine into the facts contained in the return, *and into the cause of the imprisonment*, and remand, bail or discharge, as the case shall require, and to justice shall appertain. Laws of 1818, Ch. 277, p. 298. Out of this enactment grew the existing provision of the revised statutes authorizing the prisoner to deny any of the material facts set forth in the return, or allege any fact to show that his detention or imprisonment is unlawful, or that he is entitled to his discharge. 2 R. S. 471, § 50. The note to 3 Hill, 658, n. 30, says, that "when the return is that a party is detained by process, the existence and validity of the process are the only facts upon which issue can be taken. These alone are the material facts within § 50, not whether the process is founded on sufficient evidence or any evidence at all." If this is so, then is the principle of *Cable and Cooper*, 15 J. R., restored, the act of 1818 reversing that case rendered nugatory, and § 50 of our *habeas corpus* law shorn of very much of its benignant power. But it is not so. The cases cited by the writer do not sustain his position. 9 Wend. 212, one of his cases, was on a requisition from another State for a fugitive from justice, in which the court refused to look behind the warrant, because that would in effect be removing the trial of the merits from the other State to this. The case of McLeod, another one he cites, I have already shown was, in this regard, nothing more than a refusal of the court to go behind an indictment; and his remaining authority, 11 Ad. & Ellis, 273, was upon the power conferred by an English statute, in respect to which the court in that cause say, "if the warrant returned be good on the face of it, we can inquire no farther." Can that be said of a statute which had its existence in a desire to remove doubts whether facts out of the return could be inquired into, and which, to affect its purpose, declares that the prisoner may allege *any* facts to show his detention illegal or that he is entitled to his discharge?

On commitments by final process upon summary convictions it has long been the practice to examine on *habeas corpus* the record of conviction, and if void to discharge the prisoner. *Regina v. Chancey*, 6 Dowl. P. C. 281, 1 Mod. 102; *In re Sweatman*, 1 Cow. 144, Bac. Abr. Hab. Cor. B. pl. 13; *In re Eliza Phillips*, 5 N. Y. Legal Observer, 130; *Rex v. Elwell*, 2 Str. 794, and indeed final process may in all cases be impeached by showing either that there was no judgment, decree, conviction, &c., or that the judgment, &c., was abso-

N. Y. Supreme Court.—The People v. Martin and Martin.

lutely void. *Randolph Case*, 11 Am. Jurist, 338; *Ex parte Beatty*, 12 Wend. 229; *Riley's Case*, 2 Pick. 172.

So, too, where the warrant was legal but the party illegally arrested upon it. *Pleasant's Case*, 11 Am. Jurist, 257; *Ex parte Beeching*, 6 Dowl. and R. 209, or was entitled to his discharge by something occurring after his arrest. *McLeod's Case*, 25 Wend. 572; *State v. Ward*, 3 Halst. R. 120.

And in all cases, even before our act of 1818, and at common law, the prisoner before indictment might insist that the depositions be looked into on *habeas corpus*. 1 Ch. Cr. Law, 127; Petersd. on Bail, 521; Bac. Abr. Bail in Crim. Ca. D. Formerly those depositions could be brought up only on writ of *certiorari*, but now we have a statute directing the magistrate to send them up, on a mere requisition of the officer allowing the *habeas corpus*.

I have thus taken occasion to express my dissent from the doctrines asserted in the note to 3 Hill's Reports, and more than once assented to, though never directly ruled, by the late Judge Cowen. It is the first time that the question has been directly presented for my adjudication, though it has been frequently intimated before me, and I have taken time to, examine fully into the matter, because I consider the doctrine as striking a fatal blow at the remedial powers of this great writ, and, if once established, as virtually repealing the statute which was enacted for the very purpose of affording against oppression under the forms of law the same protection which for a long time had been secured against imprisonment without due process of law. And as the reign of lawless violence has passed away and been succeeded by times when it is chiefly through the tribunals of justice that men seek to vent their evil passions upon one another, it becomes of the highest importance that this writ should be maintained in its integrity, as it is thus alone that the great duty of government can be discharged of demanding an account why the liberty of the citizen is restrained, wherever that restraint may be inflicted. 3 Bl. Com. 131.

In thus asserting and defending the high prerogative of administering relief against unjust imprisonment, as existing in this court at common law and in its members out of court under the statute, I must not be understood as maintaining that the appellate power thus conferred can or will be exercised in a wild or loose or arbitrary manner, or that an appeal exists as a matter of course in every case of a commitment, with a right to demand a review of the grounds of the commitment.

Where the party is in custody by virtue of a final judgment of a court of competent jurisdiction, he must be immediately remanded. 2 R. S. 567, § 40.

If the party is in custody on an indictment found for felony not bailable, there being no means of ascertaining the grounds on which the indictment is predicated, he will be remanded. *McLeod's Case*, 25 Wend.

If in custody on process merely irregular, he will be remanded on *habeas corpus* and be remitted to the proper court to correct and

N. Y. Supreme Court.—The People v. Martin and Martin.

remedy the formal defects in its own process. *People v. Nevins*, 1 Hill, 154; *Bank of U. S. v. Jenkins*, 18 Johns. 305.

If detained on civil process, regular and valid on its face, the examination will be confined to the jurisdiction of the power which issued it, and to the inquiry whether some event has not since occurred to entitle the prisoner to his discharge. *Ibid*.

If in custody on criminal process before indictment, the prisoner has an absolute right to demand that the original depositions be looked into to see whether any crime is in fact imputed to him, and the inquiry will by no means be confined to the return. Facts out of the return may be gone into to ascertain whether the committing magistrate may not have arrived at an illogical conclusion upon the evidence given before him, whether he may not have been governed by malice, or have exceeded his jurisdiction, and whether he may not have mistaken the law, or, in the language of Lord Ellenborough in the case of Sir Francis Burdett against the Speaker of the House of Commons, 14 East, 1, to ascertain whether the commitment was not palpably and evidently arbitrary, unjust and contrary to every principle of positive law or rational justice.

Confined within these limits the inquiry can be effectual for the protection of personal liberty against oppression under color of legal process. Extended beyond it, it might be eminently mischievous in retarding the due administration of justice, and therefore, though the power of exceeding those limits is clearly conferred, no discreet judge will step over them, unless for some palpable and overpowering cause.

I shall in this case look beyond the return and inquire into the cause of commitment, and I shall not confine my inquiry merely to an examination of the depositions which have been returned to me and for these reasons.

The warrant which is returned to the writ of *habeas corpus*, is a full commitment for grand larceny in stealing from Thomas J. Crossman, \$40 in gold coin. No such warrant could issue until the complainant and the witnesses produced in support of the prosecution had been examined on oath *in the presence of the accused*. 2 R. S. 708, § 18. Nor until the prisoner has also been examined in relation to the charge. *Ibid*, § 14.

The "allegations" put in by these prisoners in answer to the return and sworn to by them, set up that they were arrested by a person not a police officer, that when taken before the police magistrate, *they demanded an examination of the complainant in their presence, which was refused* and they were thereupon committed in default of bail.

If these allegations are true the imprisonment was clearly illegal. And they are facts out of the return, which the prisoners have a right to allege, and which it is my duty to inquire into.

N. Y. Supreme Court.—Sheldon and others v. Weeks and others.

Before the Honorable IRA HARRIS, one of the Justices of the Supreme Court of the State of New-York.

[*At Special Term, New-York, December, 1848.*]

WILSON B. SHELDON and others v. NATHANIEL T. WEEKS and others.

THREE OTHER CAUSES AGAINST SAME DEFENDANTS.

An order should not be made upon a defendant in a creditor's bill to deliver property or money to a receiver unless it appears that the party has the power to obey the order. The failure of the party to show to whom he has paid money, which is proved to have been in his possession several months before the bill was filed, is not sufficient to warrant an order on him to pay the money to the receiver.

The answer of a party examined before a referee has the same effect as an answer to a bill when the oath of the party is required. It is conclusive upon the party examining him until it is disproved.

In the assignment by a debtor under a creditor's bill, it is proper to insert an exception as to furniture exempt by law from execution, even in cases where the debtor has made a sale or assignment of all his furniture, which has been set aside as against creditors.

Where the determination of the issues of fact joined in a cause will not necessarily involve the examination of a long account, a cause cannot be referred under the act of 12th April, 1848.

THE circumstances appear in the opinion of the court.

H. P. Hastings, for plaintiff.

Edward Sandford, for defendants.

By the Court—HARRIS, J.—An order was made in this cause, on the 13th of March last, for the appointment of a receiver of all and singular the property and effects, equitable interests and choses in action which belonged to the defendant Nathaniel T. Weeks, on the 22d day of March, and also of all and singular the household furniture belonging to the defendant, Nathaniel T. Weeks, at the time of the sale thereof mentioned in the defendant's answer, and then in the house No. 26 Second-street, in the city of New-York, and intended to be transferred by the sale thereof, by Nathaniel T. Weeks to Henry A. Weeks. The defendants were also required to execute a proper assignment of the property to the receiver, and deliver the same to him on oath. They were also required to appear before the referee and submit to such examination as he might require.

A receiver having been appointed in pursuance of the order, and the defendants having executed the assignment required and having also been examined before the referee in relation to the property, the referee on the 13th of October, made an order, *declaring* that, among other articles of property intended to be transferred by Nathaniel T. Weeks to Henry A. Weeks, by virtue of the bill of sale mentioned in the order of 13th of March, were *one silver bread basket* and *one silver pitcher*, and that said articles were then in the possession or under the control of Nathaniel T. Weeks or Henry A. Weeks, and therefore *directing* that they deliver the same to the receiver. The referee in the same order *declared*, that at the time of the execution of the assign-

ment of the 22d March, 1847, mentioned in the order of the 13th March, 1848, there was in the hands of Nathaniel T. Weeks, the sum of \$4,790, which passed under the assignment, but which had not been delivered to the assignees, and he directed that Nathaniel T. Weeks deliver that sum over to the receiver. A motion is now made on behalf of the defendants, for an order that the referee review his decision.

After a careful perusal of the mass of evidence taken upon the examination before the referee, I think he has erred in his decision in respect to the silver bread basket and pitcher. The only evidence I have been able to find, even of the existence of such articles, is in the testimony of Mr. Boyce, who testified that in December, 1845, Mrs. Weeks, the wife of Nathaniel T. Weeks, and her son Henry A. Weeks, came to his shop and ordered a bread basket to be made. It was to be delivered at Mrs. Weeks' house, in Second-street. It was made and marked with the initials, "H. A. W.," and delivered on the 31st of January following. The witness also thought he made a pitcher for them a month or two afterwards. He did not know who paid him for the articles. No such articles are contained in the schedule annexed to the bill of sale of the household furniture executed by Nathaniel T. Weeks to Henry A. Weeks. Both Nathaniel T. Weeks and his wife, state that they never had a silver fruit basket in the house, no such question was put to Henry A. Weeks. In a previous examination he had been asked, after stating that he had purchased some silver spoons which had been used in the family, whether he had purchased any other silver ware before the sale, and he replied that he did not remember that he had. The question was general. The bread basket was not mentioned nor had any witness been inquired of in relation to it at that time. No inquiry was made either of Nathaniel or Henry Weeks, or of Mrs. Weeks, in relation to that silver pitcher. Such an article had not been mentioned until Boyce was examined, which was after the examination of the Weeks had closed. As the evidence stood before the referee, it was quite as likely that the articles had been purchased by Henry A. Weeks, as by Nathaniel T. Weeks. From the affidavit of Henry A. Weeks read upon this motion, it appears that if his attention had been called to the articles when he was examined, he would have shown, that he, and not Nathaniel T. Weeks, was the purchaser of the articles. At any rate, I think there was not sufficient evidence before the referee to justify him in finding that these articles were intended to be transferred by the bill of sale from Nathaniel T. Weeks to Henry A. Weeks.

I think the referee also erred in directing Nathaniel T. Weeks, to pay over to the receiver \$4,790, for money which he had in his hands when he made the assignment on the 22d of March, 1847. It does appear that about the time the assignment was executed, he had a large amount of money. It is not pretended that the money, if indeed he had it at the time of the assignment, was paid over to the assignees; and before Nathaniel T. Weeks can be chargeable with contempt, for not delivering the money to the receiver, it should appear not only

N. Y. Supreme Court.—Sheldon and others v. Weeks and others.

that he had the money when he executed the assignment, but also that he had not placed it beyond his control when the bill in this cause was filed in August following. For if, after the assignment he applied the money to the payment of his debts, he could not be punished for disobeying a *subsequent* order of this court directing the money to be paid to a receiver. To justify the order made by the referee, he should be satisfied from the evidence before him, that the party had the power to obey such order. If the money passed beyond his control before the bill was filed, it could not be reached by any proceedings against him, if after he was served with the injunction, then the plaintiff's remedy would be by proceedings for a violation of the injunction.

The answer of a party when examined before a referee should have the same effect, as evidence, as an answer to a bill when the oath of the party is required. It should be taken as the truth until it is disproved. Nathaniel T. Weeks was repeatedly inquired of in relation to the disposition he had made of the money he had received about the time he made his assignment, and he states positively that when he made the assignment he had paid it all away to his creditors, and that when the assignment was executed he had no money. I admit that it is much against the truth of this statement that he is unable to give the names of the creditors to whom he paid the money beyond a comparatively small amount. Yet I do not think this circumstance sufficient not only to overcome the positive oath of the party made evidence by the plaintiffs themselves, but also to justify the referee in finding that he not only had the money when the assignment was made, but that it also continued in his possession or under his control when the bill in this cause was filed.

In settling the form of the assignment of the household furniture to be executed by Nathaniel T. Weeks and Henry A. Weeks, pursuant to the order of the 13th of March, the referee directed a clause to be inserted excepting such articles as by law would have been exempt from sale or execution against Nathaniel T. Weeks, and the assignment was executed with such exception. A motion is now made on behalf of the plaintiffs that the referee review his decision in respect to the assignment of the furniture and that the defendants, Nathaniel T. Weeks and Henry A. Weeks be directed to deliver over to the receiver all the household furniture embraced in the bill of sale.

It is true the order, under which the referee acted, does not in terms authorize the exception allowed by the referee. It directs generally an assignment of all the household furniture. In this respect it is like the usual order for the appointment of a receiver in a creditor's suit. The 133d rule provides that the order in such a case shall direct the defendant to assign, &c., all his property, equitable interests, things in action, and effects. So also the statute under which creditor's bills are filed authorizes the court to decree satisfaction of the judgment "out of any personal property, money or things in action belonging to the defendant." (2 R. S. 174, § 39.) No exception is made, either in the statute or the rule of this court, prescribing the form of the order, and yet it has been the uniform practice to insert in the

N. Y. Supreme Court.—Sheldon and others v. Weeks and others.

assignment to be executed by the judgment debtor to the receiver an exception of such articles or personal property as are by law exempt from sale on execution. Nor has it, to my knowledge, ever been pretended that the officer executing such an order is not authorized to make such an exception from the effect of the order. It clearly never was the intention of the legislature to exempt from levy and sale the necessary articles of household furniture used in a family, and then upon proceeding under a creditor's bill to take from the family the same articles and place them in the hands of a receiver to be sold for the satisfaction of the same debt.

But it is urged that Nathaniel T. Weeks having executed a bill of sale of the household furniture, including the articles exempt from sale on execution, such sale, if void as against creditors, is yet valid as against him, and therefore he is estopped from claiming the exemption of any articles embraced in such sale. There is some plausibility in this position. But I think the argument is not sound. It is true, that if the conveyance is void in part, it is wholly void. It cannot be avoided as to part of the furniture and held good as to the residue. But when it is avoided it leaves the plaintiffs to enforce their remedies against it in the same manner as if the bill of sale had never been executed. It does not lie with them to say, that because Henry A. Weeks would have the right to take the articles exempt from sale on execution that, therefore, they have, by avoiding the transfer as against themselves, acquired the same right. They cannot ask to be placed in a better position in respect to the property than they would have been had no bill of sale been executed. I think, therefore, the referee decided correctly in excepting from the property to be delivered to the receiver such articles of household furniture as are by law exempt from levy and sale on execution.

The plaintiffs also move for a reference of these causes under the provisions of the fourth section of the act to facilitate the determination of suits before the first of July, on the ground that the determination of the issues of fact between the parties will involve the examination of a long account. I should be inclined to grant this motion if I could do so consistently with the view I have of the question at issue between the parties. But I do not think the determination of those questions will involve the examination of a long account. The only issues of fact, as I understand them, relate to the validity of the several conveyances executed by Nathaniel T. Weeks. If the plaintiffs should obtain a decree declaring those conveyances, or either of them, void, it would be a matter of course to direct in the decree that such accounts be taken as should be rendered necessary by the decision. On the other hand, if the plaintiffs fail to obtain such a decree, I do not perceive that it will be necessary to take any account whatever. I feel compelled, therefore, to deny this motion for a reference.

An order must be entered upon these motions in conformity with the views expressed in this opinion.

N. Y. Supreme Court.—Stephens et al ads. Browning and another.

Before Mr. Justice HURLBUT.

STEPHENS *et al* ads. BROWNING *and another*.

An execution may be issued against personal property alone.

If issued against both real and personal property in a county in which the judgment has not been docketed, the writ may be amended by striking out the clause as to real estate.

J. Neilson, for defendants, moved to set aside the execution in this cause on affidavits showing that it had been issued to the sheriff of Oswego county, directing that the money be made out of the defendant's personal property, and in default thereof, out of the real estate which the defendants owned on the *blank* day of October, 1848, and further showing that the judgment had not been docketed in Oswego county.

C. Ellis read affidavits showing that the judgment had been recovered in New-York, and a transcript sent by mail to the Oswego county clerk. Mr. Ellis insisted that the writ was merely against personal property, and that the direction to take lands owned on the *blank* day of October amounted to nothing.

HURLBUT, J.—Is not this an execution against real estate?

Ellis.—No. The sheriff is to take land owned on the *blank* day of a certain month. There was no such day, and the sheriff could not act upon the direction, as he could find no such real estate.

Neilson.—He is to seize the real estate owned by the defendant on the *blank* day of *October*. The execution was in the sheriff's hands on the last day of that month, and it would be his duty to make the money out of property owned on that day.

HURLBUT, J.—I think this was an execution against real estate, and was irregular, no transcript having been filed.

Ellis, asked leave to amend by striking out the clause as to the real estate, leaving the execution against personal property only.

Neilson insisted that an execution can now be issued only in the manner and form provided by the code. That by § 238 of the Code, executions are modified in conformity to the provisions of that title. That by § 241, three kinds of executions are authorized, one of which is an execution against the property of a judgment debtor; and by sub. 1, of § 244, it is provided, that if the writ be issued against the property of the debtor, *it shall* direct the sheriff to satisfy the judgment out of the personal property, and if sufficient cannot be

Court of Exchequer.—Murray v. Mann.

found, then out of the real property. The counsel insisted, that under this act, the execution could not issue against personal property alone, as at the common law ; that the amendment sought for would make a fourth kind of execution not known to the code, and could not be granted.

HURLBUT, J., thought otherwise, and granted the amendment on payment of costs of the motion.

ENGLISH CASES.

Court of Exchequer.

[*Trinity Term.*]

MURRAY V. MANN.—16th June, 1848.

CONTRACT—MONEY RECEIVED—FRAUD—SET-OFF.

In an action for the standing of a horse at livery, the defendant sought to set-off as money received to his use the price paid for the horse, by a person to whom the plaintiff had sold him. It appeared that the sale was affected by fraud, a false warranty having been given that the horse was free from vice, and that on the purchaser discovering the deceit, he rescinded the contract, returned the horse and received back the money :—*Held*, First, that the set-off, could not be maintained as the defendant's right to the price of the horse as money received to his use, arose from the contract of sale, and on that being rescinded, his right to the money was gone.

Secondly, that the plaintiff, availing himself of the above facts to rebut the set-off, was not a violation of the rule of law which prohibits a party from setting up his own fraud.

Semble, per Park, B., that if before the contract was rescinded by the purchaser the plaintiff had paid the price over to the defendant, he might have recovered it back on the purchaser's rescinding the contract.

Per Park, B.—The wilfully telling an untruth to a party to induce him to alter his condition, whereby he is induced to alter it, is a fraud in law, for which an action of deceit will lie.

Whether fraud has been practised is a question for the jury ; but whether certain facts proved amount to fraud, is a question of law.

THIS was an action by a livery stable keeper for the standing of a horse ; to which the defendant pleaded a set-off. At the trial before Park, B., it appeared that the defendant had sent the horse to the livery stables of the plaintiff, where it stood for some time. The set-off relied on was this, the plaintiff sold the horse to a person of the name of Bailey, who returned him as bad tempered ; after which, the plaintiff sold him to Lilly for 125*l.*, with a warranty that he was free from vice. Lilly after a few weeks, returned the horse on the ground that he was not free from vice, and received back the 125*l.*, but the defendant contended that the money had been received to his use by the plaintiff who was therefore bound to account to him for it. There was some evidence, that the return of the horse by Lilly, and the re-

Court of Exchequer.—Murray v. Mann.

payment of the 125*l.* to him, had been assented to by the defendant. The judge in summing up, told the jury that it lay on the plaintiff in the first instance to make out his claim for the standing of the horse. On his doing so, the defendant was bound to get rid of that claim, and this he did, by showing that the plaintiff sold the horse and received a sum of money for it, which then became money received to the use of the defendant. This turned the tables on the plaintiff again, so that it lay on him to make out that he had legitimately applied that money. In order to justify him in taking back the horse from the purchaser and refunding the price of it, the plaintiff was bound to show either that the horse had been returned and the money paid back with the assent of the defendant, of which there was some evidence; or that the contract for the sale of the horse had been rescinded. The purchaser was not entitled to return the horse unless there was an agreement that he should have a right to do so, or unless there had been fraud practised on him by the plaintiff falsely warranting the animal free from vice. If a man who sells a thing, warrants it to possess a certain quality which he knows it does not, with a view to increase the price, and in consequence of that falsehood obtains a higher price for it, it is both a legal and moral fraud. It was for them to say whether on the sale of the horse to Lilly, fraud had been practised on the purchaser, either by defendant or his agent. The jury having found for the plaintiff—

Humphrey moved for a new trial for misdirection. He conceded that there was evidence of the defendant's assent to the return of the horse, and did not move on that ground. The judge was wrong in laying down to the jury, without qualification, that the telling such an untruth as this amounted to fraud. [*Park*, B.—I did not do so. I left them to say on the evidence had there been fraud practised. *Platt*, B.—The facts to constitute fraud must be found by the jury, but whether, taking certain facts as proved, they amount to fraud, is a question of law.] At least here was no such fraud as prevented the property in the horse passing to the vendee. [*Park*, B.—The case of *Street v. Blay*, (2 B. & Adol. 456,) is an authority that if a man buy a specific horse the property passes, unless it has been sold with a special clause authorizing a return, or there has been fraud. Here was no special clause, and therefore, independent of the question of ratification, the only point is the fraud.] If any fraud were practised it was the plaintiff's own, to which the defendant was no party; and it is a principle that a man cannot set up his own fraud in answer to the claim of another who was not privy to it. Suppose the money had been paid over to the defendant by the plaintiff before the horse was returned, could he have recovered it back? [*Park*, B.—I rather think he could, although it is not necessary to decide the point; for he paid it over under the supposition that the bargain with the purchaser was a binding one, and when the purchaser afterwards rescinded the contract the money would then have been paid over in consequence of a contract the consideration for which had failed.

Court of Exchequer.—*Murray v. Mann.*—

[*Platt, B.*—It is a fallacy to call this setting up the plaintiff's own fraud; for you can only get your own money through the contract which he made with Lilly. If you take a contract you must take it with all its consequences. *Park, B.*—The rule of law is, that if an agent is guilty of fraud in transacting his principal's business with a third party the principal is responsible to that party. The learned Baron referred to *Cornfoot v. Foulke*, (6 Mee. & W. 358; 4 Jur. 919).]

PARR, B.—If at the time of the sale of this horse warranty were given that he was sound, which induced the vendee to enter into the contract, and that warranty was false to the knowledge of the vendor, it was a fraud on the vendee: for it answers the legal definition of fraud, viz., the telling of an untruth to a man in order to induce him to alter his condition and thereby inducing him to alter it. There can be no doubt that that is a deceit for which an action would lie. There is a difference between legal and moral fraud; but in the present case we have both; for the plaintiff warrants this horse free from vice, with intent to raise the price of it, and the vendee would not have given the price he did for it if he had not believed that statement to be true; and on its turning out to be a lie, he would be entitled to recover back his money. I am perfectly satisfied that the jury had their attention directed to that state of the law and of the facts. The other point, which at first sight seems to make a greater impression than it is entitled to make, although not discussed at the trial, did pass through my mind, viz., that the defendant had no right to this £125 at all, except through the act of his agent the plaintiff, and if that right rested on a defensible contract he must take his chance of its being defeated. This money was not money received to the use of any one by the plaintiff, but as it were deposited in his hands until the purchaser made up his mind whether he would return the horse or not—for fraud does not make a contract void, but only voidable at the discretion of the party on whom it has been practised, who in the present case might have elected to affirm the bargain. When, however, he chose to avoid the contract, and the purchase money was received back by him from the plaintiff, it ceased to be money in his hands which could be considered money received to the use of the defendant.

I, therefore, am clearly of opinion, that the set-off in this case was defeated by the fraud in the sale to Lilly. The plaintiff does not set up his own fraud against the defendant; he says, I only received that money subject to a defeasance. Independent, therefore, of the other fact, that the return of the horse was ratified by the defendant, I think there ought to be no rule.

The rest of the court concurring—*Rule refused.*

THE
New-York Legal Observer.

VOL. VII.]

NEW-YORK, MARCH, 1849.

[MONTHLY PART.]

CONSTRUCTION.

No. I.

LESS has probably been written upon this subject, than upon any other important branch of the law, and yet its great importance, and the uncertainty in which its rules are still involved, would seem to demand for it the attention and the labors of the profession. In the dearth of treatises upon this subject, it is proposed to lay down in the following pages a few rules mostly deduced from adjudged cases, and as far as practicable, in the language of the cases themselves.

And, in the first place, the rules of construction vary with the subject to which they are applied. As applied to the interpretation of penal statutes they differ from those applied to the interpretation of remedial statutes; as applied to wills, they differ from those applied to deeds.

We propose in the present number to consider the rules of construction as applied to statutes.

Is the statute penal or remedial?

And here we are met at the outset with the question, what is a penal statute? In a general sense, any statute which imposes a penalty is penal, but this is not strictly accurate. Statutes for the prevention of fraud, for the suppression of a public wrong, or to effect a public good, are not strictly penal statutes, though they impose a penalty. They are more properly remedial, and are to be construed accordingly.* It has been even held, that a statute penal as to some persons, if generally beneficial, may be equitably construed.† The true distinction seems to be, that where punishment is the immediate object of the statute, and prevention but an incident, the statute is penal; where prevention is the immediate object and punishment but an incident, the statute is remedial.

Penal statutes must be construed strictly, yet not so as to defeat the obvious intention of the legislature. All the provisions must be taken together, and interpreted according to the import of the words

* *Taylor v. United States*, 3 Howard 197.
VOL. VII.

† *Sickles v. Sharp*, 13 Johns 497.

Construction.

and not by mere divisions into sections, so as to give effect to the objects and intent of the statute.* The law upon this subject is laid down by Ch. J. Marshall with his usual force and clearness.† "The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals, and on the plain principle that the power of punishment is vested in the legislature, not in the judicial department. It is the legislature, not the court, which is to define a crime, and ordain its punishment." And again, "this maxim is not to be so applied as to narrow the words of the statute to the exclusion of cases, which those words in their ordinary acceptation, or in that sense in which the legislature has obviously used them, would comprehend."‡

Of late years this maxim has received a much more liberal interpretation than formerly. Thus, the statute 1 Edw. VI. c. 12, having deprived those who stole *horses* of the benefit of clergy, it was held that one who had stolen *a horse*, did not come under the operation of the statute. Even as late as the reign of George II. the old maxim was strictly enforced; and it was held that the statute 14 George II. c. 6, which made it felony to steal sheep and *other cattle*, applied only to the sheep; the expression, *other cattle*, being too vague. But the extreme strictness of the old maxim has gradually been modified, and it is now interpreted as laid down in *U. States v. Wiltberger*, and other cases cited.

Remedial statutes, on the contrary, have always been liberally construed. They are to be so construed, if possible, as to suppress the mischief and advance the remedy. In interpreting them the court have not been tied down by the letter of the statute. They look freely to its spirit. The reason is obvious. It is found in the right to life and liberty as far more precious than that to property merely. So precious that none but the supreme authority of the land should have control over it.

A curious case is given in 2 Bl. 1226, in which the interpretation of the same statute depends upon the nature of the action instituted under it—whether penal or remedial. By statute 9 Anne, c. 14, if any person shall lose at any time or sitting £10, and shall pay it, he may recover it back; and if the loser does not, any informer may sue for it, and treble the value besides. In a case arising under this statute, in which the party had lost fourteen guineas at a sitting, with an interval for dinner, as the action was brought by the loser, the court held it *a sitting* within the statute, but intimated, that had it been brought by an informer, they would not have held it *a sitting*.§

It sometimes happens that a statute is both penal and remedial. In this case it is to be construed strictly.||

* *Schooner Harriet*, 1 Story, 251.

† *United States v. Wiltberger*, 5 Wheat. 76.

‡ *Commonwealth v. Loring*, 8 Pick. 370; *Butler v. Richer*, 6 Greenl. 268; *Daggett v. State*, 4 Conn. 61.

§ See too *Cumming v. Fryer*, Dudley Geo. 182.

|| *Abbott v. Wood*, 9 Shepley, 541.

Construction.

An important rule in construing statutes is, to give full force and effect to every word.* If, therefore, by one construction a word or a number of words, are rendered superfluous, and by another each word has full force, the latter is to be received, and this though the former is the more natural construction. If, however, the word or words in dispute are clearly irreconcilable with the body of the statute, they must be stricken out.†

In every case, however, the intention of the legislature, if clearly ascertainable, is to govern.‡ To ascertain this intention, the court may resort to the title and to the preamble of the Act,—in no case, however, where the body of the Act is clear, is the title or the preamble to be so interpreted as to control the act itself.§

But there is a large body of statutes, not properly either penal or remedial, which fall under these two heads as regards their construction. Thus, a statute giving a summary remedy is to be construed literally; and those wishing to avail themselves of it must take nothing by intendment.|| Statutes in relation to the sale of lands for the non-payment of taxes, are to be construed literally.¶ Statutes which impose restrictions on trade or common occupations, or which levy an excise or tax on them, must be strictly construed.** So if they impose fines or create forfeitures.†† Statutes levying duties or taxes upon the subjects or citizens, are to be construed most strictly against the government; and their provisions are not to be extended by implication beyond the clear import of the language used.‡‡ So with statutes made in favor of a corporation or individuals, and in derogation of common right.§§ A statute enumerating persons or things of an inferior dignity, shall not be construed to extend to those of a superior dignity.|||| And lastly, whenever the statute law and the common law conflict, the latter must give way to the former. But in this case the statute is to be construed strictly.¶¶

There are many miscellaneous rules to be drawn from the reported cases upon the subject of the construction of statutes, which do not fall under either of the great divisions of strict or liberal interpretation. Thus, a statute directing the mode of proceeding of a public officer is advisory, and not essential to the validity of the proceedings, unless it be so expressed.*** A statute giving a penalty, implies a prohibition of the act rendered penal, and such act is consequently void.††† It is

* *James v. Dubois*, 1 Harr. 285; Opinion of Justices, 22 Pick. 571.

† *The State v. Acuff*, 6 Min. 54.

‡ *Jackson v. Collins*, 3 Cow. 89; *People v. Utica Ins. Co.*, 15 Johns. 358.

§ *State v. Stephenson*, 2 Bailey, 334; *Jackson v. Gilchrist*, 15 Johns. 69.

|| *Hale v. Burton*, Dudley Geo. 105.

¶ *Young v. Martin*, 2 Yeates, 312.

** *Sewall v. Jones*, 9 Pick. 412.

†† *The Mayor v. Davis*, 6 Watts. & Serg. 269.

‡‡ *U. States v. Wigglesworth*, 2 Story, 269.

§§ *Sprague v. Birdsell*, 2 Cow. 419.

|||| *Woodworth v. Paine*, Broome, 294.

¶¶ *Melody v. Reab*, 4 Mass. 471; *Commonwealth v. Knapp*, 9 Pick. 496; *Lock v. Miller*, 3 Stew. & Port. 13.

*** *Holland v. Osgood*, 8 Verm. 280; *The State v. Click*, 2 Ala. 26.

††† *Hallett v. Novion*, 14 John. 273.

Construction.

a general rule that the word *may* means *must* where the legislature means to impose a positive duty, or where the public interests or rights are concerned, and where the public or third persons have a claim *de-jure* that the power designated should be exercised.* A long and uninterrupted practice under a statute is good evidence of its construction.† Where the construction of a statute is doubtful, an argument from inconvenience will have weight, but not otherwise.‡ Where an old statute has received an early practical construction, which if it were *res integra*, it might be difficult to maintain, it will be adhered to, especially if great mischief would follow a contrary construction.§ The term *person* in a statute embraces both natural and artificial persons, unless the language indicates that it was used in a more limited sense.||

We come now to the subject of the repeal of statutes, upon which the law is somewhat involved. Before touching upon this subject, however, it would be well to observe, that if a statute is contrary to plain and obvious principles of common right and reason, it is null and void, as far as calculated to operate against those principles; or if absurd consequences arise out of a statute, it is void *pro tanto*.¶ Mr. Chitty, in his notes upon Blackstone, takes a different ground, and holds that the statute is not void. But doubtless the later decisions are the law upon this subject.

And with regard to repeal, it is to be first noted, that if a statute repealing another is itself repealed, the first is thereby revived. And again, an older statute must *generally* give way to a later one where they conflict.** If, however, both can stand, they must be so interpreted. For the law does not favor repeals by implication.†† But if it was clearly the intention of the legislature that the latter statute, though it be not repugnant in all its provisions to the former, should prescribe the only rules which should govern, it repeals the prior one.‡‡

So if a penalty imposed by a former statute is increased, the second statute virtually repeals so much of the former statute as establishes a different penalty. But where the mode of enforcing the penalty is varied, and the penalty is increased, the former statute itself is repealed.§§ So a statute imposing a penalty for the commission of an offence, is repealed by another statute imposing a less penalty for a higher grade of the same offence.||||

If a subsequent statute revises the subject matter of a former one,

* *Minor v. Mechanics' Bank*, 1 Pet. 64; *Ex parte Simonton*, 9 Port. 390.

† *McKeer v. Delancy*, 5 Cranch, 22.

‡ *Putnam v. Longley*, 11 Pick. 487, 490.

§ *Opinion of the Justices*, 3 Pick. 517.

¶ *Planters' & Merchants' Bank v. Andrews*, 8 Port. 404.

¶ *Morrison v. Barkedale*, Harper, 101.

** *Pease v. Whitney*, 5 Mass. 380.

†† *Loker v. Brookline*, 13 Pick. 342, 348; *Bowen v. Lease*, 5 Hill, 221.

‡‡ *Davies v. Fairbairn*, 3 How. 636.

§§ *Kinney v. Mallory*, 3 Ala. 626; *Bowen v. Lease*, 5 Hill, 221; *Commonwealth v. Kimball*, 21 Pick. 373; *Leighton v. Walker*, 9 N. Hamp. 59.

|||| *Smith v. State*, 1 Stew. 506.

Construction.

and is evidently intended as a substitute for it, although it contains no express words to that effect, it must operate to repeal the former to the extent to which its provisions are revised and supplied, and the parts omitted are to be considered as annulled.* But a mere change of phraseology in a revision of a statute will not alter the law, unless it evidently appears that such was the intention of the legislature.†

A general law does not operate as a repeal of a special law upon the same subject, passed previous to the general law at the same session.‡ But if passed at a previous session, and the statutes are repugnant, the former is merged in the latter.§

Non-user does not make a statute void; and it has been held that a statute passed in 1700, and recognised in 1799, was not void in 1811 for non-user.||

By judicial construction in some instances the extent and force of the term *void* when used in statutes, has been limited so as to mean *voidable*, or to be made void, by some plea or act of the party in whose favor the statutes are set up.¶

With regard to the time when a statute takes effect, it is well settled that unless otherwise ordered, it is from the date of its passage. And under this head it need only be added, that it has been held that a clause in a statute repealing a former statute does not take effect until the body of the statute goes into operation.**

In view of the law which prevails in most of the states, that public statutes are taken official notice of by the courts, while private are not, it remains to say a few words upon the distinction between public and private statutes. To constitute a statute a public act, it is not necessary that it should be equally applicable to all parts of the state. It is sufficient if it extends to all persons within the territorial limits described in the statute.†† So if it contain provisions of a private nature, as to incorporate a bank, yet if it also contain provisions for the forfeiture of penalties to the state, or for the punishment of public offences in relation to such bank, it is a public statute.‡‡ It has accordingly been held that the statute incorporating the bank of the United States is a public statute.§§ An act to tax bank stock is a public act.|||| And a statute of a private nature, containing a clause declaring it to be a public act, will be noticed by the courts as a public act.¶¶

The rules of interpretation applicable to private statutes, are the same as those applicable to public or general statutes.*** W. H.

* *The Commonwealth v. Cromley*, 1 Ashmead, 179; *Ellis v. Paige*, 1 Pick. 43, 45.

† *In the matter of Brown*, 21 Wend. 316.

‡ *Mc Farland v. State Bank*, 4 Pike, 410.

§ *Gage v. Carrier*, 4 Pick. 399.

|| *Commonwealth v. Hoover*, 1 Browne App. 25.

¶ *Green v. Kemp*, 13 Mass. 515. *Smith v. Saxton*, 6 Pick. 483.

** *Spaulding v. Alford*, 1 Pick. 33.

†† *Pierce v. Kimball*, 9 Greenleaf, 54.

‡‡ *Case of Charles Rogers*, 2 Greenleaf, 303.

§§ *Ib.*

|||| *Den v. Helmes*, 2 Penn. 1050.

¶¶ *The Brookville Ins. Co. v. Records*, 5 Blackf., 170.

*** *Bartlett v. Morris*, 9 Port. 265.

N. Y. Supreme Court.—In the Matter of John Seaman.

N. Y. Supreme Court.

[*Poughkeepsie General Term, January, 1849.*]

Before the Honorable WILLIAM T. McCOUN, SEWARD, BARCULO, and NATHAN B. MORSE, Justices of the Supreme Court of the State of New-York.

IN THE MATTER OF JOHN SEAMAN.

POWER OF SURROGATES' COURTS TO COMMIT FOR A CONTEMPT.

The power to enforce final orders or decrees in a Surrogate's Court is confined to cases where the party is ordered to transfer or hand over specific property in his actual possession or under his control.

Where, however, a final order or decree of a surrogate settles the accounts of a guardian, executor, or administrator, and decrees an indebtedness to a ward, legatee or next of kin, there is no power in the surrogate to commit as for a contempt, by reason of the non-payment of the indebtedness. The creditor's only recourse is by execution as upon a judgment and that failing he may then take an assignment of the guardian or administrator's bond on file in the surrogate's office.

Informality of commitment pointed out and commented on.

JOHN SEAMAN being imprisoned in the jail of Orange county, upon a precept of commitment issued by the surrogate of that county, applied for and obtained a writ of habeas corpus returnable before the county judge, to which the sheriff made a return setting forth a copy of the precept by which he was arrested and held in custody. The precept recites that whereas, on the 26th of June, 1848, by a certain order made in Orange county Surrogate's Court, before the surrogate of said county, at Goshen, in the matter of the final settlement of the general guardianship of John Seaman, general guardian of the estate of Josiah Mead, a minor, it was ordered that the said John Seaman pay to the said Josiah Mead, who is now of the full age of 21 years, the sum of \$427 37, with interest thereon from the 9th of July 1844, and that the said John Seaman be committed to the common jail of the county of Orange, there to remain *charged with the contempt mentioned in said order*, until he should pay the said sum of \$427 37, with interest thereon from the 9th day of July, 1844, and that a warrant issue for that purpose to the sheriff of the county of Orange.

It therefore commanded the sheriff to take the body of the said John Seaman, and him safely and closely keep in his custody in the common jail of the county, until he should pay the \$427 37 with interest, &c., or until the said court should make an order to the contrary, or the said John Seaman be discharged by due course of law; and the sheriff is commanded to make and return to the surrogate in his said court, on the first day of July, then next, a certificate under his hand of his doings in the premises, together with the writ. This process must have been issued on the day of the making of the order recited in it, viz.: the 26th June, 1848, inasmuch as the sheriff certifies, that on that day he arrested the John Seaman named in the writ, and has ever since kept him in custody by virtue of it, in the county jail of Orange county.

N. Y. Supreme Court.—In the Matter of John Seaman.

On the hearing of the matter on the return made to the *habeas corpus*, the county judge remanded the prisoner, whereupon he sued out a *certiorari*, removing the *habeas corpus* proceeding into this court.

George F. Betts, for prisoner.

Hasbrouck, contra.

Per Cur., McCoun, J.—Several questions arise upon the face of the commitment, in regard to the power of surrogates, and the manner in which the surrogate appears to have proceeded in this instance. The order as recited presents something of an anomaly in judicial proceedings. The party is ordered to pay a certain sum of money, and at the same time, without waiting to see whether he will comply or not, it proceeds to adjudge him in contempt, and directs that he be committed to jail, there to remain charged with the contempt, until he shall pay, &c. How could he incur a contempt except by a refusal or neglect to pay? It is very certain he could not, and before proceeding to adjudge him in contempt, the surrogate should have required proof by affidavit, of a demand and refusal. Under the statute in relation to proceedings *as for contempts* to enforce civil remedies, (2 R. S. 534, sec. 4,) no court of record is authorized to commit for the non-payment of money which it has ordered to be paid, until proof by affidavit is made of the personal demand of such money, and of a refusal to pay it; and the practice of the courts always has been to allow some fifteen or twenty days to elapse after demand before issuing a commitment. So under the statute entitled "Of Surrogates' Courts," where among other powers conferred, is the power to enforce all lawful orders and decrees of the court, by attachment against the persons of those who shall *neglect* or *refuse* to comply with such orders or decrees, (2 R. S. 222, sec. 6, sub. 4.) it is necessary to issue the attachment, in order to bring the person before the court to answer for his alleged misconduct in so neglecting or refusing, before he can be lawfully adjudged in contempt and committed to jail. The surrogate in this case, so far as we can judge from the commitment, appears not to have pursued the proper course, even supposing he had authority by law to enforce payment of the money by imprisoning the party.

Besides by the *habeas corpus* act, it is necessary that the contempt for which a person is committed, should be specially and plainly charged in the commitment. (2 R. S. 567, sec. 40, sub. 3.) It is not so charged in this instance. The commitment only refers to the contempt mentioned in the order, but what that contempt is, don't appear except by inference. The process in that respect is defective, and it is such a defect in matter of substance as entitles the prisoner to a discharge. (2 R. S. 568, sec. 41, sub. 3.)

It is further made a question which we shall now proceed to consider, whether surrogates have power to make decrees for the *payment of money* on behalf of wards against their guardians—and if so,

N. Y. Supreme Court.—In the Matter of John Seaman.

whether they have power to enforce such decrees by imprisonment? The authority to compel guardians to account in certain cases, and the power to settle their accounts, is not disputed; but it is said their jurisdiction extends no farther than to the mere business of compelling an account, and of ascertaining and determining the balance or amount that is due. It is true that surrogates' courts are courts of "peculiar and special jurisdiction." As such their powers are specified and pretty well defined; and though the statutory prohibition in relation to the exercise of any jurisdiction not expressly given by some statute of the State under pretence of incidental powers or constructive authority, has been removed by a repealing section in the act of May 16, 1837, (Laws of 1837, p. 536, sec. 71,) yet the common law principle remains that such courts take nothing by implication except what is necessary to enable them to carry out the powers which have been expressly granted. Now we think it is quite clear that the power to compel guardians to account with their wards, and to *settle their accounts*, includes necessarily the power to make an order or decree which shall declare the result of the accounts, determine the balance, and render the adjustment or settlement a final or conclusive one. The verb *settle* as applied to accounts means to adjust; to liquidate; to balance, as well as *to pay*; and when used as conferring power on a court, it means the power to determine what is uncertain; to *establish*; to free from doubt, as to *settle* questions or points of law.—(*Webster*.)

The statute of guardians and wards, speaks of the *final order* of the surrogate on the settlement of a guardian's account, and gives an appeal to the Chancellor. This shows that what the surrogate then does, is in form and effect a judgment or decree.—What sort of a judgment or decree he is to render in his final action upon the accounts will depend upon the nature and object of the proceeding. If the object is to ascertain the correctness of the guardian's accounts, the condition of the estate, and how the funds are invested, (the ward being still under age, and the guardianship to be continued,) then the surrogate will merely render judgment of approval or disapproval, correcting errors, if any, in the accounts and in the management of the ward's estate. If the object is to remove the guardian for cause, and to have another appointed in his stead, and this is done, the surrogate may of course order the displaced guardian to surrender the property of the ward, and to pay over the money in hand to the new guardian on pain of contempt. Again, if the ward has arrived at full age, and the object is to compel a final accounting and settlement, and such accounting has resulted in finding a balance of money to be due from the guardian to the ward, there can be no doubt of the surrogate's power to adjudicate such balance to be due, and to decree payment of it; and also, to order any specific property of the ward's in the guardian's hands, or standing in the guardian's name, to be delivered over. But the question remains—how are such decrees to be enforced? Here, again, the mode of proceeding must depend on the nature of the case. In some cases the surrogate may proceed by

N. Y. Supreme Court.—In the Matter of John Seaman.

attachment against the person—for instance, whenever it becomes necessary to enforce the surrender and delivery of specific property, securities and money to a succeeding guardian, or to the ward himself when of age, and it is ascertained that the guardian has in possession, or under his control, either money or securities specifically belonging to his ward, and which requires an act of transfer to the owner rather than act of payment to a creditor. The coercive remedy in such cases is attachment as for a contempt, founded on a refusal to do the act required. But when there has been a general accounting before the Surrogate, and he has ascertained a balance to be due, which his decree has established as a debt to be paid by one party to the other, there the law does not allow the non-payment to be treated as a contempt of his authority, because the ordinary form of execution as upon a judgment at law is suited to the case.

This distinction is recognised in the title of the R. S. relating to proceedings as for contempts, to enforce civil remedies, &c.—Sub. 3, of sec. 1 of that title, authorizes such proceedings against parties to suits, attorneys, &c., and all other persons for the non-payment of any sum of money ordered to be paid *in cases where by law execution cannot be awarded for the collection of such sum*. It follows, that if an execution can go, proceedings as for a contempt cannot be taken. Now in the act of May 16, 1837, the remedy by execution is provided in such cases as the present. After any decree is made by a surrogate for *payment of money* by an executor, or administrator or guardian, on application, the surrogate shall make a certificate, stating the names of the parties, &c., and the amount of the *debt* and *costs* directed to be paid by such decree. On this certificate a judgment may be docketed in the Supreme Court, to become a lien on lands, and on which execution may be issued in the same manner as though the same was a judgment obtained in that court; and if such execution is returned unsatisfied, recourse may be had to the party's bond in the surrogate's office—which is to be assigned for the purpose of being prosecuted.—Sec. 63, 64, 65. These statutory provisions in the law of 1837, must have been intended to supply what was found to be a defect in the law of surrogate's courts under the R. S., in regard to the enforcement of decrees for the payment of money, as distinguished from orders or decrees for the surrender and delivery over of specific property; and they serve to show that the power of surrogates as declared in the R. S. "to enforce all lawful orders, process and decrees of his court, by attachment against the person," &c., was only intended to be put in operation where obedience was refused to interlocutory orders, and to final orders or decrees in the description of cases last above mentioned; and not where a decree was made for the payment of money which had become due as a debt, owing by a guardian to his ward, or by an executor or administrator to legatees or next of kin; or if that power was originally intended to be otherwise, it seems now to be modified and made to harmonize with the principle, that where the law has provided an execution for the collection of a debt in judgment, the harsher proceeding by a commit-

N. Y. Supreme Court.—Halstead v. The Mayor of New-York.

ment as for a contempt cannot be resorted to. Believing the case in hand to be within that principle, we think the prisoner was not liable to this process of commitment. On that ground, as well as on account of the irregular and defective character of the precept itself, we reverse the order which remanded the prisoner, and direct him to be discharged.

—

[November General Term, 1848.]

Before the Honorable W. T. McCOUN, E. P. HURLBUT, and HENRY P. EDWARDS,
Justices.

DAVID P. HALSTEAD V. THE MAYOR, &C. OF THE CITY OF
NEW-YORK.

A corporation has the right to institute and defend suits for the purpose of protecting its property and interests, and also for the purpose of protecting its corporate franchises and privileges, although no such right is expressly granted by its charter.

But this right can only be exercised in cases where the corporation is a party to the suit, or where, though not a party to the record, it is the real party in interest; as in defence of titles acquired from it, and which it is bound to defend, or in defence of persons acting by its authority, and in its behalf.

A corporation without any express power in its charter for that purpose, may make a promissory note, or bill of exchange, when not prohibited by law from doing so, provided that such note or bill is given in the course of its proper legitimate business.

But as the power to issue negotiable paper is only a special and conditional implied power, every person who takes such paper is charged with the knowledge that it is necessary as a condition precedent to its validity, that the debt which forms its consideration, should be contracted in the proper legitimate business of the corporation, and he will not be protected as a *bona fide* holder, without notice, although he had no actual knowledge that it was given for a purpose not authorized by the charter of the corporation.

THE facts and circumstances are contained in the opinion of the court.

Charles O'Connor, for plaintiff.

Willis Hall, for defendants.

By the Court—EDWARDS, J.—This action is brought upon two warrants or drafts given by the defendants, and made payable to P. A. Cowdrey or order; one in the sum of \$2661,27; the other in the sum of \$300. The proof shows that the drafts, after having been duly endorsed, were received by the plaintiff; and there is no evidence that he had any other notice of their consideration, than that which is given by the instruments themselves.

No objection is made either to the form in which they are drawn, or to the manner in which they are signed, but it is contended that the defendants had no authority to give them.

The consideration of the draft for the larger amount, consisted of taxable costs, which accrued in separate suits, brought in the name of the people of the state of New-York, against eight of the supervi-

N. Y. Supreme Court.—*Halstead v. The Mayor of New-York.*

sors of the city and county of New-York, to recover a penalty of \$250 from each of them, for refusing to allow the account of one of the associate judges of the Court of General Sessions of the city and county of New-York, as they were required to do by the fourth section of the "Act to enable the supervisors of the city and county of New-York to raise money by tax," passed May 26th, 1841, (Laws, 1841, p. 267.) The consideration of the other draft consisted of counsel fees which had accrued in the defence of the same suits.

The suits were commenced in the month of September, 1841; and some years afterwards judgments were recovered against the defendants in each of them. On the 8th May, 1847, and a few days before the drafts bear date, a resolution was passed by the common council, authorizing and directing the comptroller to pay the amounts of the several judgments, with the taxable costs, and reasonable counsel fees. It was under this resolution that the drafts are drawn; and they appear to have been given for all the costs and fees which had accrued in the defence of the several suits.

The first question to be considered is, whether the defendants had the corporate right and authority to give the drafts for such a purpose.

The charter under which the defendants were incorporated, gives them no express power in reference to suits, except that of suing and defending suits in their corporate name and capacity. The extent to which they may exercise that power is not expressly stated; but, like every other incorporated body, they must have, by implication, and as a necessary incident to the powers expressly granted to them, the right to institute and defend suits for the purpose of protecting their own property and interests, and also for the purpose of protecting their corporate privileges and franchises. This is a right of self-protection which must belong as well to artificial as to natural persons. But, as a general rule, it can only be exercised in cases where the corporation is a party to the suit. There may be cases, however, in which as a matter of necessity, the defendants can exercise this right where they are not the actual parties to the record; as in defence of titles acquired from them, and which they are bound to defend; or in defence of persons acting by their authority, and in their behalf. The reason why the defendants would have the right to defend a suit in either of the cases last supposed is, that although not the nominal parties, they would be the real parties in interest. In cases, however, in which the defendants are neither the parties to the record, nor the real parties in interest, their corporate right to institute or defend suits must cease. In the case before us, it appears that the costs and fees, for which the drafts in question were given, did not accrue in any suit brought against the defendants, or against any persons who acted under their authority and in their behalf. On the contrary, they accrued in suits against persons who acted on their own individual responsibility. The suits were brought, too, for the purpose of enforcing a claim which the defendants had no interest in resisting, and for which they were not liable. They were, in no respect whatever, the parties in interest; and, although a question as to the constitutionality of the law under which

the associate judges held their offices, might have arisen incidentally, the case is not altered.

At the time when the suits were commenced, the act under which the associate judges were appointed, had been in force for upwards of a year, and they had acted as members of the Court of General Sessions during the greater part of that time. No proceedings had been instituted by the defendants for the purpose of showing that their corporate franchises had been abridged or impaired by the appointment of such judges. The constitutionality of the law under which they held their offices had thus been tacitly acquiesced in, and it does not appear that the defendants, in this respect, considered it any infringement of their corporate rights and privileges. If the supervisors chose to assume a different ground, and to disobey the law which required them to allow the accounts of the associate judges, they did so at their own peril, and they should bear the consequences. The act complained of was done on their own responsibility, and the penalty for their misconduct is entirely personal.

But it was contended on the argument, that even if it should be held that the defendants had no right to give their drafts for the consideration for which these were given, yet, that the plaintiff is entitled to recover as a *bona fide* holder without notice.

It is not denied on the part of the defendants, that the drafts in question are, in their legal effect, negotiable bills of exchange, and that the plaintiff is a *bona fide* holder, with no other notice of their consideration than that which appears upon the face of the drafts; but it is contended, that if they were given without corporate authority on the part of the defendants, they are void, even in the hands of a *bona fide* holder, without notice.

It will be remembered that the defendants have no express power given to them by their charter to issue negotiable paper. It has, however, long been a settled doctrine in this state, that a corporation without any express power in its charter for that purpose, may make a negotiable promissory note or bill of exchange, when not prohibited by law from doing so, provided such note or bill is given for a debt contracted in the course of its proper legitimate business. (*Mott v. Hicks*, 1 Conn. 113. *Barker v. Merchants' Fire Insurance Co.*, 3 Wend. 94. *Attorney General v. Life and Fire Insurance Company*, 9 Paige, 477. *Moss v. Oakley*, 2 Hill 615. *Kelly v. Mayor, &c. of Brooklyn*, 4 Ib. 263.) But, as far as we are aware, the question has never been decided whether a note or bill issued by such a corporation, not in the course of its proper legitimate business, is valid in the hands of a *bona fide* holder without notice. In the case of *The Attorney General v. Life & Fire Insurance*, in which the question arose, the chancellor declined to express any opinion, and placed his decision upon other grounds.

It was contended on the argument that the rule of the law merchant, which protects the *bona fide* holder of negotiable paper without notice, was of universal application; and that if the defendants had a right to issue negotiable paper, such paper must *ex necessitate* be subject to the same rules as the negotiable paper of an individual. This view seems plausible; but will it bear the test of examination?

N. Y. Supreme Court.—Clayton et al v. Wendell et al.

In the first place, the defendants have no general power, either express or implied, to issue negotiable paper. They have only a special and conditional implied power for that purpose; that is, it is necessary as a condition precedent to the validity of such paper, that the debt which forms its consideration should be contracted in the course of the proper legitimate business of the defendants; the act under which they were incorporated is declared to be a public act. Every person who takes their negotiable paper is bound to know the extent of their powers, and is presumed to receive it with a full knowledge that they have only a limited and conditional power to issue it. He is thus put on his inquiry, and takes it at his peril.

The circumstances under which a *bona fide* holder, without notice, receives the negotiable paper of a natural person, or of a corporation having the general express power to issue negotiable paper, are very different. In both these instances the power to issue such paper is general and unconditional; and hence, the rules which have been established by commercial policy for the purpose of giving currency to mercantile paper, are applicable.

It results from the views which have been expressed, that the drafts in question not having been issued by the defendants in their proper and legitimate business, are void in the hands of the plaintiff, although received by him without actual notice of their consideration.

Judgment must be entered for the defendants.

EDWARD CLAYTON *et al.* v. THOMAS WENDELL *et al.*

Upon an issue as to the legitimacy of a child, the marriage of the parents may be proved by evidence of reputation, cohabitation, and acknowledgment of the parties.

But when there is proof of an actual marriage, and the issue is as to the legitimacy of the offspring of such marriage, a previous reputed and acknowledged marriage will not render the actual marriage illegal, and bastardize the issue of such marriage.

THE question upon which the opinion of the court was sought, sufficiently appears in the adjudication.

Edward Sandford, for plaintiff.

Charles W. Sanford, for defendants.

By the Court—EDWARDS, J.—The question at issue in this case is whether Catharine Ann Clayton is the legitimate child of George Messeroc, deceased.

It appears by the testimony that on the 3d July, 1826, a marriage was publicly solemnized between George Messeroc and Sarah Maria Youngs; and that Catharine Ann Clayton is the issue of that marriage. It is contended, however, on the part of the respondents, that such marriage was illegal, on account of an existing matrimonial connection between the person calling herself Sarah Maria Youngs, and one Richard Schenck.

The testimony given on the part of the respondent shows, that on the 18th November, 1822, Sarah Maria Youngs made a complaint by her affidavit, before a police justice, that she was then with child by Richard Schenck, and that, on the same day, he entered into a recognisance with sureties, for his appearance to answer such complaint. Nothing further was done in the matter. It also appears by the testimony of several of the relatives of Schenck, and of other witnesses not related to him, that after this complaint had been made, the parties cohabited together, and were reputed and acknowledged themselves to be husband and wife; and that on the third day of June, 1825, they executed articles of separation, in which they described themselves as husband and wife. There is no proof of an actual marriage.

On the other hand, two of the sisters of Sarah Maria Youngs, and two of her cousins testify, that she always went by the name of Youngs until she married Messeröe; and it appears that she was married by that name.

It has long been a settled doctrine of the common law, both in England and in this state, that on an issue as to the legitimacy of a child, it is not necessary to prove the actual marriage of the parents; but that a marriage may be proved by evidence of cohabitation, reputation, and the acknowledgment of the parties. The reason for this rule is, that the law favors the presumption of morality in the intercourse between the parents, and consequently, also favors the presumption of the legitimacy of the offspring, *presumitur pro legitimatione*.

This is a rule of presumptive evidence, and like every similar rule, must depend upon the particular circumstances of the case. Thus it was held in the case of *Cunningham v. Cunningham*, 2 Dow, 482, that the presumption was impaired by proof that the connection between the parents was illicit in its commencement, and that the repute of marriage must be general to raise a presumption in its favor. And in the case of *Jackson v. Clan*, 18 Johns. 346, Ch. J. Spenser expresses the opinion that a separation between the parties to a reputed and acknowledged marriage, followed by an actual marriage, would be sufficient to warrant the jury in presuming that the intercourse and cohabitation between the parties to the reputed marriage was meretricious.

Adopting the general rule with the qualifications laid down in these decisions, it certainly might admit of doubt whether, if the question before us were as to the legitimacy of a child of the reputed marriage, there would be sufficient evidence to authorize a presumption in favor of such marriage. But, however that may be, it seems to us that the proof as to the first alleged marriage is not sufficient to render an admitted actual marriage illegal and criminal, and bastardize the issue of such marriage. It would not be sufficient to sustain an action for criminal conversation, or an indictment for bigamy. *Morris v. Miller*, 4 Burr. 2057; *Birt v. Barlow*, Doug. 171; *The People v. Humphrey*, 7 Johns. 314. The reason for these decisions is, that proof of actual marriage is necessary to overcome the presumption

which the law makes against crime, or acts of a criminal nature. Now, if we presume in this case that the reputed marriage actually took place, it necessarily follows that the marriage actually proved was criminal. The presumption which the law makes in the case of a prosecution for bigamy is not so much in favor of the criminal, as it is against the commission of crime. And whether the effect of the presumption is to protect a party against a criminal prosecution, or to protect his offspring against the stain and disabilities of illegitimacy the principle is equally applicable. Thus it was held in a case of a different character, although illustrative of the principle, that in an action against an insurance company to recover a loss by fire, the jury in order to sustain the defence that the plaintiff had wilfully set fire to the premises, ought to be satisfied that the act imputed to him was as fully proved as would justify them in finding him guilty on a criminal charge for the same offence. *Thurtell v. Beaumont*, 3 Bing. 339. The presumption in that case was against the doing of a criminal act, although the party was not on trial for a crime. And according to every rule of sound reasoning, such presumption ought to be invoked equally in favor of any person who makes a claim which can only be defeated by assuming that a crime has been committed. See *Starr v. Peck*, 1 Hill, 270, 272.

It was contended upon the argument, on the authority of *Fenton v. Reed*, 4 Johns. 52, that the only cases in which proof of actual marriage is necessary, are prosecutions for bigamy, and actions for criminal conversation. The opinion pressed by the court in that case was founded on a remark made by Lord Mansfield in *Birt v. Barlow*, above cited. But he never could have intended to say that no other case could arise in which, under any state of circumstances, proof of an actual marriage would be necessary, even if the principle upon which such proof is required, in the cases which he mentioned, would be equally applicable. Those were the only cases which had arisen, in which an exception to the general rule had been made. Here, however, is a new case, in which the application of the principle upon which those cases were decided is equally necessary and it must follow that it forms a third exception to the general rule. As there is not sufficient proof that Sarah Maria Youngs was a married woman at the time of her actual marriage with George Messerroe, such marriage must be considered legal, and the offspring, so far as the issue before us is concerned, must be regarded as legitimate.

The decree of the surrogate must therefore be reversed with costs.

[*December Special Term, 1848.*]

Before the Honorable J. W. EDMONDS, one of the Justices of the Supreme Court of the State of New-York.

IN THE MATTER OF JOSEPH BELT, AN ALLEGED FUGITIVE FROM SERVICE, IN THE STATE OF MARYLAND.

In a proceeding on habeas corpus under the Revised Statutes, the averment of a person claimed as a fugitive from service that he is a freeman, is a sufficient answer to the allegation by the claimant that such person is his slave, and a demurrer to such answer on the ground that it is argumentative and evasive will be overruled.

In submitting proof of the claim to the alleged fugitive, the contemporaneous acts of the fugitive and the claimant during the period when the relation of master and slave is said to have existed between them may be shown by the claimant.

The general rule of evidence in regard to the proof of the laws of the various States of the Union, stated in Greenleaf's Evidence, § 489, has not been adopted by the courts of the State of New-York, and is not the rule therein, excepting so far as it is enacted by the act passed April 12, 1848, entitled "an Act relative to the proof of the Statute of Common Law of other States."

The provision of the New Code, that no person shall be excluded as a witness by reason of his interest in the event of the action does not extend to cases of habeas corpus, and the claimant to an alleged fugitive from service cannot testify in behalf of his claim.

A general understanding that the laws of any state tolerate slavery, do not exempt a judge from requiring lawful evidence thereof, and failing to give such evidence the claimant of an alleged fugitive fails to establish the main point in his case, issue having been joined thereon that the person was bound to him in service.

It being sufficiently proved that the alleged fugitive was bound in service to the claimant, yet, if the claimant, instead of removing him from the state without delay, has detained him in his own custody, that is a sufficient reason why the person is entitled to his discharge. There is only one case in which a fugitive slave can be kept by his master in his personal charge in this state, and that is under the law of Congress, to take him without delay before the proper authority, in order to obtain the certificate necessary for his removal from the state. When it appears that the claimant holds his slave in this state, not for the purposes contemplated in the act of Congress, but that he holds him as his slave because he owes him servitude, it is the duty of the judge to order him to be discharged from custody.

On the 21st day of December, 1848, on an affidavit made by Thomas Peck, of the city of New-York, setting forth, that on the 20th December, (the day preceding,) Joseph Belt, while walking with the deponent in Duane-street, in the said city, was kidnapped by some persons, to the deponent unknown, and was carried off; and that the deponent had just learned that the said Belt was carried to Gravesend, on Long Island, by his kidnappers, and was there detained by their waiting for a change of wind, to be carried to the south as a fugitive slave; and that deponent believed that he would be carried out of the state before he could be relieved by a writ of habeas corpus; a writ was issued by Judge Edmonds, in pursuance of the provisions of the Revised Statutes, addressed to the sheriff of King's county, or to any policeman of the city of New-York, reciting the facts set forth in the affidavit, and commanding the party addressed to take the said Joseph Belt, and him forthwith bring before the judge, issuing the same at the City Hall of the city of New-York, to be dealt with according to law.

The sheriff of King's County, Daniel Van Voorhis, Esquire, deputed Russell F. Hulse, a police officer, of the city of New-York, to execute the process; and Hulse, assisted by Samuel Wolven, a police officer of the city of Brooklyn, proceeded instantly to Gravesend, and on the next day returned that he had executed the writ, and had the person named therein in custody.

On the hearing before Judge Edmonds on the same day, Mr. John Lee, of Maryland, with his counsel, James R. Whiting, Esquire, appeared, and claimed the custody of Belt as his fugitive slave, and prayed time to put in a return to the writ in the form prescribed by law, which was duly granted, and the hearing postponed until the next morning, when the following answer was put in.

"I, John Lee, of the county of Frederick, in the State of Maryland, do return to the annexed writ, that a colored boy named Joseph Belt, the person now present, at the time of the service of said writ, was under my restraint, and that I claim to hold him under my restraint as a person held to labor and service due to me as a citizen of the State of Maryland. That said Belt is a fugitive from said state, and from my service in the said State of Maryland, under and by virtue of the laws of which state he is held to labor and service as a slave to me.

"And I do further return, that said Joseph Belt ran away from me in the month of November, one thousand eight hundred and forty-seven. That at that time he was in Baltimore, in the said State of Maryland, in my service, and he privately, against my knowledge and consent, with a view to effect his escape from my service, to which he was lawfully held, and (as I believe) proceeded to Lynn, in the State of Massachusetts, and from thence to the city of New-York.

"That on Wednesday last the 20th of December instant, I caused the said Belt to be arrested and brought to me, from which time and until the service of the annexed writ he was in my custody and control, as his master and owner, and I claim it to be the duty of your Honor to restore the said Belt to my custody from whence he has been taken by the annexed writ, together with a certificate sufficient to warrant me in removing said slave and fugitive from labor to the state of Maryland aforesaid, from which he fled, without any further molestation or interruption.

Sworn this 23d day of December, 1848, }
J. W. EDMONDS.

JOHN LEE.

Accompanying the answer were the affidavits respectively made by Theodore C. Shadbolt, of the city of New-York, and William Hunkey, and H. R. Howlett, of Gravesend, in the county of Kings, stating that in conversation they had with Belt, he had admitted that he was the slave of Lee, that his master had brought him to Baltimore to sell, and that he had run away from him at Baltimore, and had gone from there to Lynn, near Boston, in the state of Massachusetts, whence he had come to the city of New-York.

N. Y. Supreme Court.—In the Matter of Joseph Belt.

John Jay, Esq., appeared as counsel for Belt, and asked time to put in a reply on his behalf, and the hearing was adjourned to the 26th December, when the following reply was made :

"I, Joseph Belt, not admitting that at any time I have been legally held to service or labor to John Lee, but insisting that I am a free citizen of the United States, and not legally held to service or labor, do allege that whilst passing through Duane-street, in the city of New-York, in the state of New-York, on the 20th day of December, 1848, in company with Thomas Peck, about half past eight o'clock in the morning, I was seized by two persons whom I believe to be Charles Bird and Sydney Clayton, and forcibly and violently thrust into a hack carriage, the door of which was immediately closed by the driver. That the question being asked why I was so seized, it was stated by the persons arresting me, that I was charged with stealing at the fire. That both myself and Peck denied having stolen anything, and insisted that we had not been out on the night before, at which time the fire was said to have taken place. Not regarding this denial hand-cuffs were placed by these men upon me, but as hand-cuffs were about being placed on one of the arms of Peck, he was ordered to get out of the hack, and was told he was not the man. Peck refused to get out of the hack, desiring to go with me, but at my request he left the hack to inform Mrs. Jackson, at whose house I boarded, of my arrest. The persons in the hack told Peck they would take me to the Tombs, where he might find me. After Peck left I was carried to a hotel in Broadway, and then to the residence of Charles Bird, in Eldridge street, in the city of New-York.

"The two men in the carriage who had hand-cuffed me, stated they were going to take me to Long Island and keep me there until they caught some other person; that then they would bring me back to New-York and have me tried, but did not say for what they intended to try me. That at the hotel in Broadway, a man named John Lee came into the hack, and said to me, "I will pay you for all this." One of the men got out at the hotel when Lee entered the hack. On arriving at Eldridge-street I was compelled to get out of the hack, go up stairs into a room, when Lee and Bird questioned me about the whereabouts of some person I knew nothing of. After remaining about fifteen minutes I was placed in the hack again with Bird and Clayton, and driven across a ferry in the East River and carried about ten miles to a village on the ocean beach. There I was placed in a room until Thursday evening, the 22d instant, when I was removed to another house, about a mile and a half distant from that I had been first placed in. I remained there by force and restraint until Friday morning about 1 o'clock when I was brought back to this city by officer Hulse, under the warrant issued by his Honor, John W. Edmonds. I was deprived of my liberty without any process of law. The seizure of me in the public street was done in a riotous manner, in breach of the peace, with illegal violence. From the time of kidnapping by the said Bird and his associate Clayton, on Wednesday morning, the 20th instant, until Friday morning, the

22d instant, I was kept hand-cuffed and restrained of my liberty. When notice was given that officer Hulse had arrived with a warrant, Clayton hastily took off the hand-cuffs and asked me to get out of the window, intending as I believed, to re-capture me; I declined to go out of the window; went through the door into the adjoining room, and met officer Hulse.

I believe that Lee, Bird and Clayton have entered into a conspiracy to kidnap me, and carry me away out of the state of New-York. That Lee has promised to indemnify Bird and Clayton against any harm they might suffer from violation of the laws of the state of New-York. That the intention of all these parties was to keep me in irons in this state, secretly and without the knowledge of the public authorities, until they had succeeded in kidnapping some other person. At no period since my arrest has any process of law for my arrest or detention been exhibited to me or alleged to have been issued. At the time of my arrest I was not half a mile from the ferry to Jersey City, and the train for Philadelphia, which is the most direct route for Baltimore in Maryland, did not leave until 9 o'clock A.M. That I have been informed and believe there were eight regular departures or modes of travel from this city to Philadelphia and southward between eight o'clock on the morning of 20th December, and 1 o'clock A. M. of 22nd December, and there were other irregular departures. The village where I was detained, was, I believe, Gravesend, on Long Island, and is in a direction contrary to that of any route leading to Philadelphia and southward, and there are no regular means of communication from Gravesend to Philadelphia.

Sworn this 26th day of December, 1848,	}	his
before me. HENRY VANDERVOORT,		JOSEPH ~~X~~ BELT..
Clerk of Sessions, &c.		mark.

To this reply, Lee put in a general demurrer.

For the Demurrer. J. R. Whiting, Esquire, who, upon the whole facts stated, contended—

1. That upon the pleadings in the cause, it was clearly to be inferred, that the boy Joseph was a slave belonging to Mr. Lee; that the averment that he was a free man, was no answer to the allegation of Lee, that he was a slave; that the reply was argumentative and evasive; and he claimed of the court to decide that he was now a fugitive slave.

2. That, if a slave, the master had a right, under the constitution of the United States, to arrest him in this state, either himself, or by the persons whom he employed without warrant, and take him home with him.

3. That in the manner of the arrest, or in the detention of the slave, though done as stated in the reply, there was nothing to impair his right to the slave; and he demanded of the court, that the boy should be delivered to him as his slave.

In enforcing his claims, Mr. Whiting complained of those who interposed in aid of the boy, as attempting to rob Mr. Lee of his pro-

N. Y. Supreme Court.—In the Matter of Joseph Belt.

perty, and agitating a subject which puts the union of the states in jeopardy. He cautioned all concerned against being led away by sympathy.

Against the Demurrer. John Jay, Asa Childs, Esquire, lately of the Maryland bar, and John McKeon, Esquire, District Attorney of the city and county of New-York, (who appeared in the cause under the provisions of the statute of the State of New-York, passed May 6th, 1840, requiring the district attorney of each county, upon due notice, to render his advice and professional services in all proceedings for the recovery of alleged fugitives from service or labor,) presented and argued the following points—

I. This is not a proceeding under the act of Congress for the delivery of fugitives. The alleged master has not come here voluntarily for a certificate, but he has been dragged here by force of law, on a complaint entered on behalf of Belt. That act, therefore, has nothing to do with these proceedings, and no certificate can be properly demanded under it. The judge will be governed by the provisions of the Revised Statutes, (2 Vol. 469, § 40 and 41,) and discharge the party unless legal cause be shown. Belt stands here as a free citizen of a free state, and the court will so regard him until the contrary be proved in accordance with the usual rules of evidence. Even admitting that he has been held as a slave by Lee, and has escaped from him, it does not follow that he was *legally* held. He may have been kidnapped from a free state, and reduced to slavery unjustly. (See Law of New-York of 1844, appointing agents to recover citizens who had been kidnapped.) His insisting, therefore, that he is not legally held to service, but is a free citizen, is a sufficient denial under 2d Revised Statutes, page 471, § 50. This is a matter affecting liberty, and every intendment is to be made in favor of freedom. The proceeding is a summary one, and the strict rules of pleading are not required to be followed, provided the sworn answers are sufficient in substance. The reply is, therefore, good, and the demurrer should be overruled.

II. Even if the reply of Belt be construed as admitting that he was the slave of Lee, which it does not; and if the court were sufficiently satisfied of that fact, *which they cannot be by any admission expressed or implied*, still the other facts shown by the reply sufficiently show that the imprisonment in which he was found on the service of the writ was illegal,—

FIRST. Recapture of slaves can only be made either under the act of congress of 1792, or under the constitution of the United States.

Belt was not captured under the act, for he was not taken before a magistrate, nor any certificate obtained for his removal. His capture, to have been legal, must, therefore, have been under the power conferred by the constitution. But if the constitution does give such right, it gives it only *where it can be done without a breach of the peace or illegal violence.* (*In re Kirk*, 4 New-York Legal Observer, page 459, quoting *Prigg v. Commonwealth of Pennsylvania*, 16 Peters, 539.)

The owner's privilege being in derogation of State Rights—the rights of every free citizen are to be preserved—the power to seize the slave is coupled with the condition that there be no illegal violence; and if the condition is broken in the execution of the power, the power is gone, and the arrest is void. Here *there was illegal violence towards a free citizen, Peck*, in the arrest of Belt; *and an infringement of the public peace*; and the arrest of Belt was therefore illegal *ab initio*, and any subsequent detention under it void.

SECOND. The answer shows the detention to have been illegal, even if the arrest were good. The power of recapturing slaves, is in derogation of state sovereignty and common law right, and must be strictly followed. It is given simply for the purpose of *removing the slave to the state whence he fled*. (See Act of Congress, 1792.) The owner is entitled to reasonable time to recover his slave, but may not detain him here for his convenience. Here, no intention immediately to remove the boy appears, *but the contrary*. Belt was taken from the city of New-York, the usual port of departure where opportunities for removal abound, to a remote village, and moved from house to house for the *purposes of confinement and concealment* until an indefinite period, when some other alleged slave should have been captured. Such detention cannot be justified under the facts shown, nor could it have been justified if a certificate had been previously obtained by Lee under the act of congress, for such certificate warrants not the detention of the slave in the state, but only the *removal of the slave* out of the state. See Revised Statutes, 662, (repealed,) *that slaves become free if continued here beyond time specified*;—and Act of May 6, 1840, Gen. Stat., page 330, § 7, *that the removal must be by direct route*.

And under the principle settled in the case of slaves, 18 Pickering, the voluntary detention of Belt in a free state by his master, entitles him to his freedom.

THIRD. If the demurrer is overruled, and the reply held sufficient, Belt is entitled to be immediately discharged. The reply shows his right to freedom, apart from any facts that might be produced touching his former condition, and as it is in the discretion of the court to decide finally on the present hearing, they will not detain an innocent man, who is to be held free until proved to be a slave, in order to allow the respondent to procure or manufacture proofs of his having been once a slave. He should have brought legal proofs when he first came to arrest him.

The counsel for Belt, in reply to the charge of interference with the constitutional rights of the claimant, maintained that the claimant admitting Belt to have been his slave, had, in his arrest and detention in the manner proven, overstepped the farthest limits of his authority, and committed an outrage upon the dignity of the State of New-York, and the peace and quiet of its citizens.

Whiting, in reply—quoted Sergeant on the Constitution, ch. 31, page 387.—*Glen v. Hoages*, 9 Johnson R. 69; *Wright v. Dean*, 5 Ser. & Rawle, 62; *Commonwealth, &c., v. Griffin*, 3 M^cLean, 480.

Curia advisare vult.

1848, *December 26th*. And now at this day, the court overruled the demurrer, adjudging the reply sufficient, and allowed Lee to submit proof in support of his claim.

THOMAS LEE, sworn as a witness for the claimant. I reside in Frederick county, Maryland, and have resided there all my life. I am twenty-nine years old, and am nephew of the claimant. I know Belt perfectly. He is the man now here. I have known him as long as I can recollect, upon the estate of the claimant in Frederick county, Maryland, where he resides. He was always on that estate when I knew him. He was born the slave of John Lee, and was always in his service. I knew his mother, who was also in his service; she was a slave also. I knew his grandmother; she was on the same estate, and is still living. Belt is about twenty-two years old. I saw him last until yesterday in the rail-road cars going to Baltimore; Lee was with him. I am pretty well acquainted with the laws of Maryland.

Question by counsel for claimant. Do those laws authorize slavery?

To this question the counsel for Belt objected, and after an argument thereon, the court overruled the objection and allowed the question to be put.

Answer. Yes sir, they do.

Question by counsel for claimant. Do you hold slaves under those laws?

Objected to, and the objection sustained by the court.

Cross-examined by McKENON of counsel for Belt. Mr. Lee sold Belt's mother as a slave. My estate joins that of Mr. Lee. I know the boy was not born in New-York or Pennsylvania, but I was not present at his birth.

Direct examination resumed. Belt went to Baltimore as a house servant.

Question. Did you ever hear of Belt's claiming to be free from the service of the claimant?

To this question the counsel for Belt objected, insisting that no previous acts or expressions of Belt could be received as evidence to prove that he was a slave; and after hearing an argument on the point, the court overruled the objection, and declared that the contemporaneous acts of the parties might be shown.

Direct examination continued. I never heard of Belt's claiming to be a free man. I have heard Belt call Mr. Lee master. Belt was always considered by the other slaves on the estate as a slave. People resident there are acquainted with each other's slaves in the neighborhood. Belt was always reputed in the neighborhood to be a slave. I have not the slightest doubt as to Belt's identity.

Cross-examination resumed. Belt is a mulatto.

The counsel for the claimant here offered the laws of Maryland from their statute book, and objection being made by the counsel for Belt, quoted 1 Greenleaf on Evidence, § 489, and the decisions there quoted being held by the Court to be inapplicable to the state of New-York, a different rule having been adopted by the courts of that state, the counsel referred to a recent statute of the state of New-York,

passed April 12, 1848, entitled "An Act relative to the proof of the statute and common law of other states and territories." "§1. Printed volumes, copies of the statute laws of any other of the United States or of the Territories thereof, if purporting to be published under the authority of the respective governments, or if commonly admitted and read as evidence in their courts shall be admitted in all courts of law and on all other occasions in this state as *prima facie* evidence of such laws."

The volume offered in evidence was objected to by the counsel for Belt on the ground that it did not appear that it was published "by the authority of the government of Maryland," and there was no evidence that it was a volume commonly admitted and read in their courts. The counsel for the claimant proposed to prove by a resident of Maryland, that the volume offered was the regularly authorized edition of the laws of the state, and as such was recognised and read in their courts, and for this purpose called as a witness,

John Lee, the claimant in person, whom he was about to examine, when *Jay* on behalf of Belt objected on the ground that Mr. Lee being directly interested in the result was utterly incompetent to testify in the matter.

Whiting. By the new code no person is excluded by reason of his interest in the event of the action. Mr. Lee is perfectly competent.

Jay. If the code authorizes the claimant in a matter involving personal liberty to testify in his own behalf, it is clearly unconstitutional. Our common law rights in this matter are part of the constitution, and are not to be overthrown by an act of the legislature.

The Court. Whatever may be thought of the code generally, it is not unconstitutional, for it expressly excepts the new rule of evidence from all cases of this kind. and the testimony of Mr. Lee is inadmissible.

Whiting. I will then call Mr. Child.

Asa Child, sworn. I have practised law in Baltimore. In Maryland they have books of law similar to this, which purport to be published by authority, which are read in their courts as evidence.

I did not know Jeremiah Hughes. I am not aware that this is a copy of the books thus read. I have seen similar volumes that are read in the courts of Maryland that look like this.

By the Court. I cannot say that this volume is a copy of those commonly admitted and read in evidence in their courts.

The testimony on the part of the claimant here closed, and

Child moved on the facts as they stood to dismiss the prisoner.

Jay, in support of the motion, was stopped by the court.

Whiting, on behalf of the claimant, argued at length the following points :

1. That the judge had no jurisdiction to take the boy out of his master's custody. *Prigg v. Commonwealth of Pennsylvania*, 16 Peters. *Case of Jack*, 12 & 14 Wendell's R. *In re Kirk*, 4 N. Y. Legal Obs.
2. That in a slave state, all colored men are presumed to be slaves ; and that the same presumption must be allowed here. *Jones v. Van Zandt*, 2 M'Lean, 596 ; 1 Washington's C. C. R. 308 ; 2 Wend. 1.

By the Court : EDMONDS, J., said he would not trouble the counsel for the prisoner to argue the case. There were two points on which his mind was very clear, and which were decisive of the question before him.

In the first place, it was necessary for the claimant to establish the fact, that the prisoner was bound to service. The evidence was satisfactory that he had been *held* to service in Maryland, but there was no evidence, that under the laws of that state he was *bound* to service.

The claimant had failed to prove the laws of Maryland in such a manner as under the rules of evidence, to permit them to be referred to, and he could not therefore know or hold that by those laws, slavery was tolerated in that state. It was true, it was generally understood that it was, but upon any such general understanding no judge could act. There must be lawful evidence thereof, and that the claimant had failed to give. He had, therefore, failed to establish the main point in his case, and on which the issue has been joined, namely, that Belt was bound to him in service.

But even if that had been sufficiently proved, there was another reason why the prisoner was entitled to his discharge, and that arose from the manner in which he was detained by his master.

There was only one case in which a fugitive slave could be held by his master, in his personal custody, in this state. That was under the law of Congress to take him without delay before the proper authorities, in order to obtain the certificate necessary to justify his removal out of the state. This had not been done in this case. Instead of taking Belt before the United States District Judge, the claimant had removed him to a distance. Instead of taking him there without delay, he had detained him in his own custody for two days. Instead of seeking a judicial determination on his claim to the boy's services, he had withdrawn him to a distance and concealed him. And now on his return he claims, not that he holds him under the act of Congress for the purposes contemplated in that statute, but that he holds him as his slave, because he owes him servitude. If he can do this for two days, he can for two years or twenty. To justify this, would warrant every slaveholder in the nation to hold his slaves in this state as long as he pleases, notwithstanding that slavery was unknown to our laws.

As the claimant then avowed that he held the boy not in conformity

N. Y. Supreme Court.—Clayton v. Wolven and Hulse.

to the act of Congress, but in contravention of it, it was the duty of the judge to order him to be discharged from that custody.

In doing so, however, the judge said he must not be understood as attempting to decide the question, whether the boy was actually a slave, or whether his master had or had not the right to enforce his return to his service, under the laws of Congress. These were questions not before him, and on them he expressed no opinion. He merely intended to decide that the boy was entitled to be discharged from his present restraint, because that restraint was not in conformity to the laws of Congress, or the laws of this state.

Whiting, now moved the court to order Belt into the custody of proper officers, to be conveyed before a judge of the United States Court, that his master might claim the certificate authorized by the act of Congress.

Edmonds, J.—The boy is discharged, and I must decline your application. My official duty does not require it, and if it is asked on any other grounds, it would not be a proceeding to my taste.

The *District Attorney* to Belt. Go, you are free; and Belt passed from the court room through the crowd assembled in and about the City Hall, and was understood to have soon after proceeded to New-England.

[City of Brooklyn.]

Before Mr. Justice GARRESON.

THE PEOPLE ON THE COMPLAINT OF SIDNEY CLAYTON V. SAMUEL WOLVEN AND RUSSELL F. HULSE.

In this state all are presumptively free men, of whatever color.

The arrest, detention and concealment, without legal process, of a colored person, on pretence that he is a fugitive slave, establish a strong *prima facie* case, against the party committing such violence, of felonious intent under the statute against kidnapping, and justify the conclusion, that an illegal disposition is designed to be made of him. It is made the duty of even private persons, to arrest any one in the act of committing a felony, and a charge of assault and battery and false imprisonment brought against officers for arresting a party under such circumstances, without warrant will be dismissed.

This was a criminal complaint against the officers by whom the *habeas corpus* in the preceding case of Belt, had been served. The facts sufficiently appear in the opinion of the justice.

For the defendants, appeared on the hearing—

John Jay, M. B. Field and Asa Child, Esquires.

By the Court.—In this case it appears from the testimony that the complainant and another, had without legal process violently seized

a colored person named Belt, in open day, and in a public street in New-York, and forcing him into a carriage, ironed him, and under the pretence of taking him to the "Tombs" to answer, as they alleged, a charge of stealing a coat, had suddenly conveyed him to a retired place at Gravesend in this county by the sea side. Here he was detained under duress for a period of very nearly thirty-six hours; and until Clayton had ascertained that suspicion had been created as to his object, and a messenger had been despatched to Brooklyn to disclose the affair and cause an investigation, when Belt was removed to another place about a mile distant, and still forcibly detained. At this latter place, the defendants, (who are officers,) empowered by warrant from Judge Edmonds to produce Belt before him, at a stated time, found Clayton and Belt, the latter just emerging from the room in which the former was, and under just such circumstances as to show that he had only then been released by Clayton, who had discovered their approach. That finding Clayton had acted without legal authority in the seizure and detention of said Belt, the officers not only took the latter under their warrant for that purpose, but also required Clayton to accompany them to Brooklyn and New-York and detained him in custody some hours, and until he was released by Judge Edmonds on motion of counsel. Upon this act of the defendants is based the charge of assault and battery and false imprisonment made by Clayton, and it only remains to determine how far the defendants are right or wrong and whether under the circumstances any offence has been committed by them. By statute, every person who shall without lawful authority, forcibly seize and confine any other, or shall inveigle or kidnap any other, with intent either to cause such other person to be secretly confined or imprisoned in this state against his will, or to cause him to be sent out of this state against his will, or to cause him to be sold as a slave, or in any way held to service against his will, is guilty of felony. With us here all are presumptively free men of whatever color. The acts of Clayton throughout, to my mind clearly show a forcible seizure without legal authority, and establish a felonious intent as to the final disposal of Belt, and thus make a strong *prima facie* case against him under the statute. If Belt, as alleged by Clayton, had been arrested at the direction of Lee, who claimed him as his slave, and had been taken before the proper judicial officer to adjudicate such claim, his arrest without process might have been justifiable; but the fact that upon his seizure, he was taken from the city and detained for such a long period in as secret a manner as possible, justifies the conclusion that no such legal adjudication was contemplated, and that an illegal disposition was designed to be made of him. It is made the duty of even private persons to arrest any one in the act of committing a felony, and the law permits the arrest of any person without process who has committed such an offence. Such being the law, Wolven and Hulse, who seem to have acted entirely in good faith in this matter, were justified in so arresting Clayton, and are accordingly discharged.

N. Y. Court of Common Pleas.—Jones v. Kip.

[*Onondaga Special Term.*]

Before the Hon. DANIEL PRATT, Justice.

HUTCHISON *et al.* ads. CLARK.

In a cause commenced before the code of procedure went into effect, execution cannot be issued until thirty days after perfecting judgment.

N. F. Graves, counsel for defendants, moved to set aside the execution in this cause on an affidavit, showing that it had been issued before the expiration of thirty days after perfecting judgment, and that the cause was commenced in March, 1848.

Thomas Barlow, counsel for plaintiff, read affidavits, showing that plaintiff's demand might be lost if the execution was set aside.

PRATT, J.—The execution was irregularly issued, and must be set aside. *Motion granted.*

N. Y. Court of Common Pleas.

[*General Term, January, 1849.*]

Before the Honorable D. P. INGRAHAM and CHARLES P. DALY.

JOHN S. JONES, *respondent*, v. HENRY KIP, *appellant*.

PRACTICE UNDER CODE—JUDGMENT UPON DEFAULT—APPEAL.

Under the provisions of the code no appeal can be taken to reverse a judgment by default entered by the Clerk of the Court.

THE complaint was on a due bill for \$80. It alleged that defendant on the 1st January, 1846, signed and delivered to plaintiff the bill in question, by which he acknowledged his indebtedness, &c., and averred non-payment, &c.; and annexed to the complaint was the usual notice.

No answer having been put in by the defendant within the time prescribed, judgment was entered by the clerk of the court.

Notice of appeal was served on plaintiff's attorneys in fifteen days after judgment was entered by the clerk, and after execution was delivered to the sheriff.

The grounds of appeal were—

I. That the complaint did not state facts sufficient to constitute a cause of action.

II. That disbursements were charged not allowed by law.

For the respondent it was insisted—

I. That no appeal lies from a judgment entered by the clerk of the court.

II. That if the complaint did not show such facts as would constitute a cause of action, he should have demurred.

III. That defendant had been guilty of laches.

Clinton Huring, for the appellants.

Stevens and Hoxie, for respondents.

By the Court—INGRAHAM, J.—The defendant in this case appeals to the general term from a judgment entered by the clerk upon default.

There can be no doubt but that defendant had a remedy, if the complaint did not show facts sufficient to constitute a cause of action by a demurrer. *Sec. 122.*

This he has neglected to adopt, and now seeks to reverse the judgment by appeal. I am at a loss to see the authority by which an appeal can be taken to the general term. By the law as it existed previously, there could be no appeal or writ of error to the court in which the judgment by default was entered. We must, therefore, find the authority for it in the code, if it exists.

The appeal to the general term in the same court is prescribed by *Sec. 297*, and is confined to appeals from a judgment entered upon the direction of a single judge, and subject to review at a general term, and excludes judgment to be entered by the clerk, as authorized in *Sec. 202.*

The 127th *Sec.* reserves to the defendant the benefit of the objection to the jurisdiction of the court, and likewise that the complaint does not state facts sufficient to constitute a cause of action, but the only way in which the defendant can avail himself of this exception, in the first instance, is by motion, and not by appeal. There has been no decision by a single judge from which an appeal can be taken.

I am of the opinion that nothing in the code contemplated an appeal from a judgment entered by the clerk.

There can be no hardship in such a rule. The defendant had a remedy by demurrer or by answer. If he neglected both, he had notice that the plaintiff would apply for judgment to the clerk. If he permits such judgment to be taken, he is not in a condition to ask the appeal as a favor, but ought to be held concluded by his laches; at any rate, we see no ground upon which the appeal to the general term can be made.

The appeal in this case, even if allowed, would not relieve the defendant. The objection to the complaint is, that certain allegations should have been added to the complaint to show the defendant's liability.

Such a defect, if it exists, the court is required by the 149th *Sec.* to amend, by inserting the allegations material to the case, where it did

Court of Common Pleas.—*Brown v. Chapman.*

not change the cause of action. We should allow such amendment either on the argument or on the motion, if made; and no benefit would result to the defendant, unless it be the payment of costs by the plaintiff.

This appeal must therefore be dismissed.

ENGLISH CASES.

Court of Common Pleas.

Before a Full Bench.

BROWN. V. CHAPMAN, 4th May and 29th June, 1848.

TRESPASS FOR FALSE IMPRISONMENT—EVIDENCE.

A. preferred a charge of embezzlement against B., before a magistrate, the latter said, "Do you intend giving B. into custody for it?" A. replied, "I do give him into custody;" whereupon B., by an order of the officer of the court, went into the dock:—Held, that there was no evidence of A. having done more than call upon the magistrate to exercise his jurisdiction; and that the consequent imprisonment was the act of the magistrate, for which trespass would not lie against A.

TRESPASS for false imprisonment. Plea, not guilty. At the trial before *Coltman, J.*, at the sittings for London after Hilary Term, 1847, the plaintiff was non-suited. A rule was afterwards obtained calling upon the defendant to show cause why the non-suit should not be set aside and a new trial had.

Cockburn, Bramwell and *Huddleston*, in support of the rule.

Byles, Sergt., and *Prentice*, showed cause.

Cockburn, replied—

As the court went fully into the subject, and into the evidence given at the trial in delivering their judgment, it is unnecessary to repeat the facts or to give the arguments at the bar.

The following cases were cited:—*Flewster v. Royle*, 1 Camp. 187; *Barker v. Rollinson*, 1 C. & M. 330; Hale's Pleas of the Crown, vol. 1, p. 582; *Id.* vol. 2, p. 110; Chitty on Pleading, 7th ed., vol. 2, p. 441; *West v. Smallwood*, 3 Mee. & W. 418; *Berry v. Adamson*, 6 B. & C. 528; *Curratt v. Morley*, 12 B. Rep. 18; *Christopherson v. Bare*, 12 Jur. 374; *Arrowsmith v. Le Mesurier*, 2 B. & P., N. R. 211; 2 Wils. 302; Vin. Abr., "Trespass" D. a., sec. 10; Dalton, J. P., 580; *Jenner v. Sparks*, 1 Salk. 79; Com. Dig., "Execution," c. 12; *Bird v. Jones*, 9 Jur. 870.

Cur. adv. vult.

COLTMAN delivered judgment of the court:—After stating the nature

Court of Common Pleas.—Brown v. Chapman.

of the action, and the result of the trial, proceeded—Upon the argument of the rule, the question was, whether the plaintiff had given evidence upon the trial which ought to have been submitted to the jury; that the imprisonment of the plaintiff was the act, and under the authority of the defendant. It appeared upon the report, that the first witness called on the part of the plaintiff was Mr. Gunn, who was clerk to the police magistrates at the public office at Lambeth-street, and the substance of his evidence was, that the plaintiff and defendant, with their respective attornies, appeared at the police office on the 12th November, when the plaintiff's attorney informed the magistrate that the plaintiff attended to answer a charge of embezzlement, to be preferred against him by the defendant; and the defendant then said (also addressing the magistrate) that he did prefer a charge of embezzlement against Brown, on which the witness added, "Brown was desired to go into the dock by one of the persons, I think I told him myself;" and he added, they were going into the matter without a charge being formally made, when the magistrate said, "I cannot go into the matter unless a charge is made formally." Then the defendant said, "Well, then, I charge him with embezzling 30s." The plaintiff was ordered to go into the dock, and the defendant was sworn. It is clear there is nothing in the evidence of this witness that ought properly to have been submitted to the jury to charge the defendant with this action. A witness, named Coles, was next called by the plaintiff, he said "the defendant's attorney made some observations to the magistrate, to the effect, that they had a charge to make against the plaintiff; that the magistrate, as the witness believed, then said he could not entertain any charge unless the defendant gave the plaintiff into custody. The defendant then said, he charged the plaintiff with receiving 30s. from Mr. Francis, and not accounting to him, the defendant, for the same." That the officer of the court then took the plaintiff and placed him in the dock for prisoners. This witness said he believed the expression used by the magistrate was, "unless the defendant gave the plaintiff into custody," but added, that he, the witness, would pledge his oath that the magistrate used the word *custody*. It might be observed, that no expression is imputed to the defendant by this witness, but that he charged the plaintiff with receiving 30s. from Mr. Francis, and not accounting for it; and he adds, "the officer then placed the plaintiff in the dock." This expression of the defendant, addressed to the magistrate, was no evidence upon which to charge the defendant by the act of the officer of the court. What the defendant did in thus preferring the charge of embezzlement to the magistrate, however it might subject him to another form of action, if done without probable cause and maliciously, would not render him responsible in this action as for false imprisonment.

The third and last witness called by the plaintiff was Johnson, and it was upon this man's evidence alone that any question can arise whether the case ought to have gone to the jury. This witness, Johnson, stated, that on the defendant preferring his complaint to the ma-

gistrate, the magistrate said he would not hear the charge unless it was brought formally before him. That the defendant said, Brown had been embezzling some of his money; on which the magistrate said, "Do you intend giving him into custody for it?" That the plaintiff replied "I do give him into custody;" and that the plaintiff was told to go into the dock, and then the matter was entered into. And he added, "It was one of the constables told the plaintiff to go into the dock." The evidence given by the witness in his examination in chief, it will be observed, differed very materially from that of the two former witnesses, although that evidence purported to detail the same transaction as that to which the evidence of this witness referred; and if the case had depended upon the comparative accuracy or credit due to the witnesses, that credit and accuracy would of course have been for the decision of the jury but it did not so depend because this witness upon being cross-examined said, the statement which the two former witnesses had made as to what had passed before the magistrate was correct; thus leaving the case as it stood upon the evidence of those two witnesses.

But, supposing this witness's evidence as given in his examination in chief to be correct, and disregarding the qualification of that evidence upon the cross-examination, still that evidence does not, as it appears to us, present any thing for the consideration of the jury. In considering the effect of Johnson's evidence, as contained in his own examination in chief, it is to be observed, the defendant, neither before his attendance at the police office, nor at any time, made any application for a warrant against the plaintiff, nor did any act voluntarily to cause the plaintiff to be taken into custody. When at the police office he preferred his charges to the magistrate, and all his communications and expressions were expressed to the magistrate alone; and the important expression which Johnson represented the defendant to have used, that is, "I do give him, the plaintiff, into custody," was said to have been so used, in answer to the statement of the magistrate, that he could not hear the charge unless it was brought formally before him; and to the question, "Do you intend to give him into custody." The question, therefore, upon this evidence is, whether the defendant should be considered as merely calling upon the magistrate to exercise his jurisdiction, leaving him to the exercise of that jurisdiction upon his own discretion; or, whether the defendant's expression ought to be considered as addressed to any one who might happen to be in court, and who would think fit to act upon it by taking the plaintiff into custody; or in other words, whether the imprisonment ought to be referred to the exercise of authority on the part of the magistrate, or to the unauthorized act of some officer of the police court voluntarily interfering by ordering the plaintiff to go into the dock. It appears to us, the act of the defendant throughout amounted to no more than calling on the magistrate to exercise his jurisdiction; and that the particular expression, which alone can properly be argued to be evidence of authority given by the defendant for the imprisonment of the plaintiff, was addressed to the magistrate, and him only, and

that no other person could properly act upon it; and we think that such an expression used by a party to a magistrate in the course of preferring a charge, cannot be considered as constituting the magistrate the agent of the suitor, or as calling on him to act ministerially upon the authority of such suitor, any more than an individual who should move a judge or court for the commitment of a party for an alleged contempt can be considered as conferring a ministerial authority on such a court or judge, or as rendering him responsible for any imprisonment which would be consequent on the motion.

Therefore, even taking the precise words used by Johnson to be strictly accurate, still, regard being had to the place and occasion of their being used, they may be considered as merely invoking the exercise of the magistrate's authority. This view of the case appears to us to be consistent with the general principle of the law, as disconnected with the particular subject. If an individual prefers a complaint to a magistrate, and procures a warrant to be granted, on which the accused is taken into custody the complainant in such case is not liable in trespass for the imprisonment; and that is even although the magistrate has no jurisdiction according to the case of *West v. Smallwood*, 3 Mee. & W. 418, a party who shall make direct application to a magistrate for a warrant, that another may be taken into custody, is deemed thereby only to make an appeal to the magistrate to exercise his jurisdiction, and the imprisonment is referred alone to the magistrate's authority so as to exempt the complainant from all liability in trespass; and what takes place in the presence of the magistrate ought to be referred to the exercise of his authority, as in *Barber v. Robinson*, 1 C. & M. 330. In that case the plaintiff, having been discharged from criminal custody by the magistrate, was leaving the police office, when the defendant said, "I have another charge against him for forgery;" on which the plaintiff was again taken and placed at the bar; and upon the trial before Lord Lyndhurst in an action of trespass in respect of this second imprisonment, the plaintiff was non-suited; and, upon motion to set aside the nonsuit, it was held, that the acts of the defendant were part of the proceedings before the magistrates, for which the defendants could not be held liable in trespass; that the taking could not be considered as the act of the defendant, who had only put the law in motion for which he might be liable in case.

And it appears to us in this case, that the defendant never did more than call upon the magistrate to act; and that the plaintiff's being placed at the bar must be referred to the authority of the magistrate; and that the nonsuit in this case was right, considering the case only upon the evidence in chief given by Johnson. The cross-examination of Johnson left the plaintiff's case upon the evidence of Gunn and Cole; and upon their statement it is quite clear the defendant merely preferred his charge of embezzlement before the magistrate, which would not render him liable in trespass for the consequent imprisonment. The rule, therefore, for setting aside the nonsuit must be discharged.

Rule discharged.

THE
New-York Legal Observer.

VOL. VII.]

NEW-YORK, APRIL, 1849.

[MONTHLY PART.]

U. S. District Court.

[Southern District of New-York.]

Before the Honorable SAMUEL R. BETTS, District Judge.

IN ADMIRALTY.

JOHN HYER *and others* v. THE SCHOONER WAVE.

PILOTS' CLAIM FOR SALVAGE—JURISDICTION, &C., &C.

This case was decided several years since, April, 1831. The doctrine of pilots claiming as salvors, and the place where salvage service might be performed, as well as the jurisdiction of the court when the same was rendered within the "Faucus Terræ" and bays, &c.—were in this county subjects of strenuous discussion, if not involved in some considerable obscurity. The present case was taken up by appeal to the Circuit Court and the views of the court below dissented from in several respects.

Subsequently, however, the same points have been before the Supreme Court of the United States and the views as now given fully sustained, viz.,

- I. That the Admiralty Courts of the United States have jurisdiction over a claim of pilots for salvage and for the recovery of pilotage.
- II. That pilots are under no legal obligation to go on board or take charge of a vessel unless she is in a condition to require the services of a pilot strictly as such.
- III. That the court has jurisdiction over claims for salvage services when the same are performed on waters within ebb and flow of the tide within the territorial limits of a state.

THE facts and circumstances are fully stated in the opinion of the court.

Aaron Burr, for the libellants.

E. Paine and Dodge, for the schooner.

BY THE COURT—BETTS, District Judge.—This is a claim of salvage on the part of the owners and crew of the pilot-boat *Gazette*.

The facts are concisely these :

The schooner *Wave* left her moorings at the wharf in this city on the 2d of February last, with intent to go to sea.

A pilot, one of the libellants, had been on board after she was ready for sea, but as she was locked in by ice and there appeared no

chance of getting her out soon he left her, under an understanding, as it seems, to return when wanted.

A signal was afterwards hoisted for a pilot, but a sudden opening of the ice about the schooner occurring, she put out without waiting for one, keeping the signal up.

The signal was soon hauled down, the captain thinking his mate a competent pilot in this harbor.

Near Bedlow's Island a pilot-boat was spoken coming up, and an inquiry was made from on board the Wave about the ice below. No pilot was asked for. In the lower bay the schooner was found to have sprung aleak and to be making water rapidly.

The captain ordered a signal for a pilot to be made. Immediately afterwards it was run down and a signal of distress hoisted. Guns were also fired. The schooner was then brought to anchor in three and a half fathoms water, about a mile from Sandy Hook beach.

She was fast filling; the crew were exhausted with their exertions, two of them spitting blood, and in despair of being able to keep her afloat much longer, they had brought their baggage on deck and loosened the boat with a view of making their escape.

The pilot-boat of the libellants, when the signal of distress was first observed, was outside the Hook, from three to five miles from the Wave. She immediately made efforts to reach the Wave, but the tide being ebb, and the wind strongly ahead, it could not be effected under about an hour and a half. When within hail the inquiry was made, what was wanted. The captain of the Wave said his vessel was sinking and he wanted assistance. Hyer, one of the libellants, boarded her and ascertaining her situation, sent back his small boat for more men, and soon after ordered the pilot boat brought along side.

Hyer is a branch pilot; he had on board the Gazette with him two deputy pilots, three apprentices and a cook.

When Hyer went on board the schooner, the captain surrendered possession of her to him. The testimony as to the expressions used, is not, however, very clear or entirely consistent. Some of the witnesses understood that the schooner was delivered up to him absolutely, and others that she was surrendered to him as *pilot*.

We can probably arrive at a more satisfactory understanding of what was contemplated at the time, by adverting to what was actually done on both sides, than by weighing the recollection of different witnesses against each other, for the purpose of fixing upon the exact language used between the parties. Besides, a mere repetition of the words spoken by no means invariably communicates the acceptance of those using or hearing them at the time; and we should repose still less confidence in an attempt to state the precise expressions used at a moment of great agitation and excitement.

Hyer immediately assumed the entire command on board the schooner. He ordered the hatches broken open; shifted the cargo aft to raise her bows; placed a strong relief at the pumps; sent hands forward in a small boat to check the leak by securing a tarpauling

U. S. District Court.—Hyer and others v. The Schooner Wave.

and board over it ; unloaded the Wave in part, and loaded the pilot-boat ; and when the schooner was so far lightened and freed of water as to be navigable, he ordered both vessels under way, towing the Wave by the Gazette to Prince's Bay, where she was anchored and repaired and afterwards brought to the city, by his orders exclusively.

The master and crew of the Wave acted throughout in obedience to the orders of Hyer, and neither when she was at anchor, or in making the repairs, or after she was ready for service, did the master pretend to any authority in relation to her, or claim the command. It appears then to me, that whatever may have been the language used, the whole course of conduct on both sides demonstrates that the parties themselves did not consider Hyer and his crew were rendering the services of a pilot only on the occasion. The acts of the master clearly demonstrate that he regarded himself divested of all control over both vessel and cargo ; and those of Hyer equally show, that he deemed both subject to his authority and direction. What relation each party sustained to the subject matter, in judgment of law, will be more fully considered hereafter.

After the Wave and her cargo were brought back to the city, and the owners had refused to make the compensation demanded for these services, the libellants instituted a suit *in rem*, in this court, against the vessel and cargo, claiming salvage ; and they contend on the argument, that if they cannot be compensated as salvors, they are entitled to recover in this action, an extra reward, as pilots, commensurate to the risk run and services rendered. The respondents appear and contest the demand, and insist, that the libellants can have no relief in this court, it not having jurisdiction either in behalf of the parties, or over the subject matter. It is denied that this court can entertain the suit, for three reasons : 1. Because the services were performed in the port of New-York and within the body of a county. 2. Because the libellants are pilots. 3. Because, by the laws of the State of New-York, under which they were commissioned, the libellants were bound to render the services performed by them, and can only be compensated therefor conformably to the provisions of the state law.

1. The first objection rests upon the proposition that the United States' courts of admiralty cannot take jurisdiction over civil causes of a maritime character, arising within the territorial limits of a state.

It will be unimportant, in considering this proposition, to inquire whether the cause of action arose, in this case, within the limits of this state or those of New-Jersey, for if the objection is valid, it equally excludes the jurisdiction of this court in either event.

Assuming that the services rendered by the libellants would have entitled them to salvage, if rendered on the high seas, the point is narrowed to the single inquiry, whether the jurisdiction of the court over a subject matter properly appertaining to it, is destroyed because the cause of action arose upon waters within the boundaries of a state ?

The question is one of great magnitude, for if the doctrine of the

U. S. District Court.—Hyer and others v. The Schooner Wave.

respondents' counsel is correct, courts of admiralty have no jurisdiction, other than what is expressly given them by statute in revenue cases or criminal matters within the bays, harbors and inlets with which our vast range of coast is indented and all civil causes of a maritime character, having their origin in these places, fall exclusively under the jurisdiction of the states within whose territorial limits those waters flow. The argument is founded upon general principles alone: no decision of any state court, claiming such jurisdiction, is referred to, nor am I aware of any decision of any court in this country which supports the doctrine. There is, unquestionably, a great contrariety of opinion in our courts regarding the character and extent of the admiralty jurisdiction; but that difference has respect to the *subject matter* over which the jurisdiction may be exercised, rather than to the *place* where the question arises; and will, therefore, be more appropriately considered hereafter.

Although, generally, the question of jurisdiction of courts of admiralty is determined by the subject matter of the controversy, yet in many instances the *locus in quo* is a most material particular, (4 Wheat. 438; 10 Wheat. 420.)

It is contended, upon the decisions of the courts of common law in England, that the admiralty jurisdiction is limited to matters occurring upon the *high seas*. Without tracing minutely the rise and extent of that doctrine in England, it is sufficient on this branch of the case, to observe, that it was always a contested point between the court of admiralty and the courts of law, (Zouch, 1 to 51, 122; 1 Sir Lio. Jenkins^d; 6 Hall L. Jour. 568; 1 Hagg. R. 312; 4 Inst. 134, Prynne's animad. 75, et seq.) and that in the end the common law judges have conceded that admiralty may have a *concurrent* jurisdiction *as to place*, in bays, harbors, &c., within the ebb and flow of tide, where ships of war float, *Bruce's case*, 2 Leach. C. C. 1093.) Besides, whether the rule has limits or not in England, our courts regard the decisions of the English common law courts, in respect to the jurisdiction of the admiralty, as of little or no authority. (2 Gall. R. 345; Ib. 398.) And this particular point appears to be put at rest by decisions of the highest character and authority in this country, which recognise a like jurisdiction of the admiralty in bays, harbors, &c., where the tide ebbs and flows, as on the high seas. The High Court of Appeals, in Pennsylvania, previous to the adoption of the constitution, recognised the admiralty jurisdiction as embracing the waters of the Delaware opposite the city of Philadelphia. (1 Dall. R. 49.)

Judge Bee took cognizance of a salvage case in Charleston harbor, respecting goods *cast on shore*, &c., notwithstanding there was a state law in force in regard to *wrecks*, which applied to the case. (Bee R. 170.) The Supreme Court sustained a libel for salvage on the Delaware bay near the town of Lewis. (4 Cranch, 342.)

So, at a later date, salvage has been allowed for services on board a vessel at anchor in Hampton Roads. (8 Wash. C. C. R. 567.) The court takes jurisdiction in admiralty of claims for seamen's wages, when any part of the service is on *tide waters*. (10 Wheat. 420.) In all

U. S. District Court.—Hyer and others v. The Schooner Wave.

cases of tort and revenue falling within the cognizance of admiralty, *tide waters* have been considered equally with the *high seas*, places where that jurisdiction could be exercised.

It was decided soon after the organization of the Supreme Court, that violations of the revenue laws in the waters of our bays, harbors, &c., were in *their nature* cases of admiralty jurisdiction. (*La Vengeance*, 3 Dall. 297.) The court has been invoked on various occasions to review that decision, but it has always been sustained to the fullest extent. (2 Cranch, 406; 4 Cranch, 443; 7 Cranch, 112; 1 Wheat. 20; 8 Wheat. 391.)

The cause of prosecution occurred in that case at about the same place where the Wave anchored—within the waters of Sandy Hook. Judge Story investigated the subject at an early period in his judicial career, with great sagacity and depth of research, and demonstrated the legitimate jurisdiction of the admiralty over waters *within the ebb and flow of tide*. (1 Mason R. 100; 2 Gall. 298,) and after a lapse of fifteen years, the learned judge avows his adherence, in substance, to the doctrines he had before laid down. (5 Mason R. 465.)

The circumstance relied upon, therefore, that the cause of action arose within the limits of a State, would not exclude the jurisdiction of this court over the subject.

The Supreme Court has decided that the cession of cases of admiralty and maritime jurisdiction by the constitution, is no cession of the waters upon which those cases may arise. The waters themselves remain the territory of the state within which they lie. (3 Wheat. 388.)

Whatever relation, therefore, this jurisdiction may have to *locality*, it does not require to support it that the sovereignty over the *place* should be in the United States, or out of a particular state.

It is, in this respect, of the same character as the jurisdiction conferred upon the federal judiciary, over "all cases affecting ambassadors, other public ministers and consuls," which must be exercised without regard to territorial limits or jurisdiction.

It seems to me, also, that suits in admiralty by material men come within the same principle.

The cause of action in such cases always arises within the territory of a state, yet admiralty has unquestionable cognizance of them upon tide waters, (2 Gall. 365; 4 Wheat. 438,) and even with respect to actions by seamen for wages—between joint owners for the possession and management of vessels, and upon hypothecations, the entire cause of action may have its origin and termination within a State. So far as *place* is taken into contemplation in determining whether admiralty can have cognizance of causes of civil and maritime jurisdiction, the single consideration seems to be, whether they have relation to transactions on the sea or tide waters. (10 Wheat. 420.)

2. The second objection to the jurisdiction of the court has reference to the capacity of the parties. It is denied that *pilots* can maintain suits here for any services they may render. This objection embraces two propositions: 1. That pilots cannot be salvors. 2. That

U. S. District Court.—Hyer and others v. The Schooner Wave.

a court of admiralty cannot take cognizance of their claims for the compensations allowed them by law.

1. The first branch of this objection must undoubtedly be intended to be limited to situations where the pilot might be required to perform the duties of his office, and not to apply wherever they might chance to navigate the high seas.

The libellants; or, some of them, were appointed to pilot vessels from New-York, to sea, and from sea to New-York, by the way of Sandy Hook.

It will not, therefore, probably be denied that, if they should render services on board a vessel off Charleston harbor, or any place remote from Sandy Hook, they might, notwithstanding their commission as pilots, claim as salvors in that behalf. The objection is understood to be, that pilots cannot be salvors in places where they may be bound to act as pilots.

No case has been cited in which this specific doctrine is advanced; but it is deduced from the assumption that the libellants, as public officers, were bound, *ex officio*, to perform the services rendered in this case. I shall hereafter advert more particularly to this position, in considering what duties were imposed on them *virtute officio*, and unless it is found to result from the character and obligations of their appointment, there would seem to be no foundation in law or principle for the disqualification set up against them. The principles of the maritime law would certainly apply no stronger in excluding pilots from becoming salvors, than it would to the ship's company of the vessel saved, it being their duty to render all practicable aid to the vessel to which they belong. And yet at this day it is incontrovertibly settled, that seamen may be rewarded as salvors for services in the preservation of their own ship. (*Blanca*, 2 Cranch, 268; 2 Mas. 319.) So, also, the crew of a king's ship, whose specific duty it is to protect and succor merchant vessels, are entitled to recover salvage for extraordinary exertions in saving a vessel or cargo. (*The Mary Anne*, 1 Hagg. 158.) Not only have the respondents failed producing any direct authority in support of this doctrine, but it does not appear that the objection was ever raised in the English admiralty; or if it has been, the principles upon which that court proceed, have completely discountenanced and overruled it. (Godolphin, 45 to 50, 166, 183; Zouch, 50.)

In the case of the Joseph Harvey, before Sir W. Scott, in April, 1799, the judge observes, "It is allowed the court may, in cases of pilotage, as well as of salvage, direct a proper remuneration to be made. It may be, in an extraordinary case, difficult to distinguish a case of pilotage from a case of salvage, properly so called; for it is possible that the *safe conduct of a ship into a port*, under circumstances of extreme danger and personal exertion, may exalt a pilotage service into something of a salvage service."

In that case pilots claimed salvage. They boarded a vessel off Dover Castle, which had a signal up for a pilot and wished to go into the Downs. When spoken the answer was that the vessel wanted a pilot, and there being strong proof of mal-conduct on the part of the

U. S. District Court.—Hyer and others v. The Schooner Wave.

pilot, and the testimony given by him of the distress of the vessel being contradicted, the court refused him any compensation.

The question, however, was directly before the court, whether salvage could be claimed by a pilot under such circumstances, and no doubt seems entertained but that it could be. (1 Robinson's R. 257.)

Another case is cited by the reporter, in which there being no misconduct of the pilots, a liberal salvage was awarded by the court. It was the case of a salvage on the coast by a pilot-boat going out to the assistance of a vessel in distress.

The court award salvage with strong language in support of the claim. "It is expedient," the judge remarks, "for the security of navigation, that persons of this description, ready on the water and fearless of danger, should be encouraged to go out for the assistance of vessels in distress." (*The Sarah*, 1 Rob. 263, note.) So also the courts in this country have recognised the same doctrine.

In the case of *Dulany, a pilot, v. The Sloop Paragon*, in the District Court of South Carolina, the libellant claimed salvage. He boarded the vessel at anchor at Bull's Inlet, which had been injured in a storm, having lost her masts, &c., but the crew had rigged a jury-mast; the vessel was tight and sufficiently provisioned. The libellant towed her into Charleston harbor.

Judge Bee decided that it was not a case for salvage, but that the pilot should be allowed \$200, above pilotage and costs of suit. (Bee R. 212.) No doubt was suggested of the authority of the court to give salvage to a pilot. *Hand and others v. Schooner Elvira and cargo*, upon facts extremely like the preceding, (except the vessel was not found at anchor,) was also a claim for salvage by pilots. The libellants when they boarded the schooner were "cruising in their vocation on board their pilot-boat," and the question was raised and discussed by counsel, whether the pilots could be salvors in the case.

The judge declared he had no difficulty upon this point and adopted the sentiment of Sir W. Scott, that circumstances may occur exalting a pilotage into a salvage service; and he allowed salvage in the cause. Before Hopkinson, Dist. Judge, Penn. Dist. May 14, 1829.*

The District Court of South Carolina continues to take cognizance of claims by pilots for salvage. It has been recently allowed by that court for piloting a vessel out of Charleston harbor, without any question as to the jurisdiction of the court. (*Owners of pilot-boat Washington v. Ship Saluda*, April, 1831.) I am therefore satisfied that by the maritime law, pilots may be remunerated as salvors, even in cases where they may be acting in the capacity of pilots. Whether the statute has prescribed a different rule with respect to the pilots of this port will be more particularly considered hereafter.

2. If this court can justly entertain jurisdiction of this cause it would be authorized upon the pleadings before it, if the service is

* Since published, 1 Gilp. R. 60.

U. S. District Court.—Hyer and others v. The Schooner Wave.

proved to be a pilotage service, to award the libellants a compensation as pilots, should it decide that they could recover nothing more. The second branch of the second general objection therefore raises the question, whether pilots can sue for and recover pilotage fees in a court of admiralty.

Inquiries into the legitimate jurisdiction of courts of admiralty, are amongst the most perplexed questions of our jurisprudence. No standard is established by which this *questio vexata* can be determined with exactness. By the Constitution, the power of the Federal Judiciary extends to all cases of admiralty and maritime jurisdiction; and by the act of Congress of September 24, 1789, the district courts have exclusive original jurisdiction of all civil causes of admiralty and maritime jurisdiction; but neither the Constitution nor the statute defines what that jurisdiction comprehends, nor do they indicate the sources from which principles may be drawn limiting or explaining it.

A subsequent act, passed May 8, 1792, provides that "the forms, and modes of proceeding in suits of admiralty and maritime jurisdiction shall be according to the principles, rules and usages which belong to courts of admiralty as contra-distinguished from courts of common law, except," &c., &c.

This act has been construed not to have reference to *all* courts of admiralty, but to those of England and this country alone, (10 Wheat. 490,) and although the same case interprets the act to have relation to the *practice* of the court only, and not to its *jurisdiction*, yet a strong implication would arise that Congress contemplated that a court of admiralty in this country derived the principles regulating its jurisdiction and those which were to govern its practice, from one and the same source.

If it be admitted, however, that we are to regard the jurisdiction of the admiralty in England as that which is to determine the character and extent of the jurisdiction of our courts, yet a great difficulty still remains, to ascertain what period in the history of that jurisdiction we are to select, and whether we are to model our judicature in this behalf in conformity to the ancient functions of the English admiralty, or limit it to the powers that court exercised at the revolution.*

Neither can the authority that court exercised at any given period of its existence, be now defined with certainty. The evidences of its jurisdiction are far from being clear or satisfactory. By the civilians an almost unlimited extent is claimed for it; whilst the crown lawyers generally consider its legitimate authority as very restricted and unimportant.

The history of the foundation of the court is no longer extant. The

* Two very recent decisions in the U. S. Supreme Court, have settled the admiralty jurisdiction of the U. S. courts. It is substantially as laid down in this case. (5 How. 541; 6 How. 344.)

U. S. District Court.—Hyer and others v. The Schooner Wave.

reasons and purposes leading to its establishment are to be implied only from the objects the court was found to subserve.

The theory of British polity supposes the monarch to be the fountain of all judicial authority. In the earlier ages of the government, and indeed after the constitution had attained to some degree of symmetry and force, the judicial power was either exercised in person by the king, or was conferred by him at discretion, upon such tribunals as he might designate.

The court of the admiral (with those of the marshal and constable) was undoubtedly called into being as an instrument by which the royal prerogatives in relation to matters *dehors* the kingdom could be most conveniently exercised.

The admiralty court was probably instituted with limitations and restrictions now lost to judicial history; but it would soon be discerned that the court was adapted, by the celerity of its action and its ready subserviency to the will of the monarch, to enlarge and strengthen his powers; and that consideration would lead him, from time to time, to encourage its cognizance of subjects of a purely municipal character. The readiness of the lord high admiral, or his surrogate, to amplify his jurisdiction, would also conduce to draw under his cognizance matters occurring within the kingdom, whether wholly territorial or mingling with transactions on the high seas and abroad, appertaining appropriately to the tribunal.

How long and to what extent this domestic and municipal jurisdiction of the admiralty was exercised, cannot now be ascertained; but there is abundant evidence that it was exceedingly comprehensive and diversified. (Zouch, 14; 50 Godolphin.) Almost the earliest notice furnished by history of the existence of the court, consists in details of the strenuous efforts made to subdue and bound its authority, in relation to matters of an internal and municipal character. The acts of 13th and 16th Richard II. were passed for that purpose; the one directing the admiral should only meddle with things *done upon the sea*, and the other, that he should not take cognizance of *contracts, pleas, and other things rising within the bodies of counties, nor of wreck*. But, although these statutes designate certain matters with which the admiral should not meddle, neither of them assumes to define the legitimate objects and limits of his jurisdiction.

An active controversy subsisted for ages afterwards between the courts of common law and admiralty, upon the claim of jurisdiction; the king was appealed to, as the fountain and arbiter of the powers of all the courts; he commanded a mutual adjustment of the disputed point by the respective judges; but although the arrangement was solemnly consummated on paper, it was never observed, and the common law courts proceeded by gradual advances, until they nearly extinguished all procedures in admiralty. Except as a prize court, it now exercises, in fact, in England, but a meagre and stinted authority, compared with the powers it once wielded; yet, it is believed, the admiralty court does not to this day accede to the justness of the restrictions imposed upon its jurisdiction. (2 Dod. 371; 1 Hagg. 312.)

U. S. District Court.—Hyers and others v. The Schooner Wave.

Let it, therefore, be established that we are to resort to the English admiralty for the principles and usages which shall govern the proceedings of our own courts of that denomination, it is manifest that difficulties of serious magnitude lie in the way of any practical and available use of the criterion. It still remains to be settled, to what period or era of that court we shall direct our attention; and how we shall ascertain what authority then properly appertained to the court.

The learning in relation to the history of the English admiralty—its just jurisdiction—the claims of the common law courts in contravention of it—and the principles upon which the admiralty and maritime jurisdiction conferred by the United States' constitution, should be exercised, are collected and ably systematized, in the Introduction to Hall's Admiralty Practice; Introduction to Sergeant's Constitutional Law, 2d edition; Duponceau on Jurisdiction, appendix; *De Lorio v. Boit*, 2 Gall. R. 398; 1 Kent's Com. 342; 5 Wheat. 106, (note); 12 Wheat. 614; Johnson Justice, and note; 5 Mason R. 467; 6 Dane's Abridg't. 355; Zouch, 14; Godolphin ch. 4, Exton.; 4 Co. Inst. 134; 12 Co. R. 79; 1 Beawe's Lex Merct. by Chitty; Pfyne's Animad. 75, and these general references will be sufficient to bring the doctrines that have prevailed upon these topics into view, without a more detailed citation of passages and cases.

The general position which the courts of this country seem disposed to maintain is, that admiralty will take cognizance of subjects of controversy of a *maritime character*. (2 Gall. R. 345; 2 Amer. Jurist, 24, 40.)

The piloting a vessel to and from sea, would seem to be peculiarly a service of a maritime character. I do not find that the right to recover compensation for these services, by suit in admiralty, has ever before been called in question; or that the manner in which the pilot was commissioned, or whether or no the local law supplied him a more convenient remedy, was allowed to affect the right to resort to this court.

No doubt seems ever to have been suggested by the court or bar in England, that pilots might recover their fees in admiralty, (except for services on navigable rivers, *Eleanor*, 6 Rob. R. 39; Abbott, ch. 5,) although such suits are common. (*Joseph Harvey*, 1 Rob. 306; *Benj. Franklin*, 6 Rob. 305; *Nelson*, 6 Rob. R. 227; *Leander*, Edw. R. 35,) and notwithstanding a summary remedy by attachment of the vessel is provided them by statute.

So, like suits have been sustained in our own courts. (Bee R. 86; 1 Wes. R. 568.) Judge Story remarks, that admiralty has, upon principle, a rightful jurisdiction as well *in personam* as *in rem*, for pilotage, for services performed *on*, *from*, or *to* the sea; and he expresses his *extreme doubt* of the correctness of the decisions of the English common law courts, that no suit lay in admiralty in favor of a pilot for services *on a navigable river within the body of a county*.

And it is to be remarked, that neither the statute of Massachusetts, or the existing one of this state, prescribe the manner in which the compensation of pilots is to be recovered, or furnish any extraordi-

nary facilities in their behalf. It would, therefore, seem to result, that though commissioned under a state law, the pilot might have recourse to any remedy adapted to the nature of his right, and I should unhesitatingly hold that this action is maintainable in admiralty, whether the libellants claim compensation as salvors, or for pilotage fees. The mode in which the amount of such fees is to be assessed or ascertained, may be determined by the local law without affecting the remedy in this court. The action of the court, in regard to matters already within its jurisdiction by the general principles of the maritime code, may be limited to the enforcement of the existing municipal law. (*The Robert Fulton*, 1 Paine C. C. R.)

It is not necessary now to inquire whether the state courts have concurrent jurisdiction with the admiralty for the recovery of pilot fees, inasmuch as no exclusive or specific remedy is prescribed by the statute act. Yet, if it is in its nature a case of admiralty and maritime jurisdiction, there is great weight of authority for the argument, that the jurisdiction of this court is exclusive of that of state tribunals, whether conferred upon them by the laws of the state or by acts of Congress. (1 Wheat. 337; 1 Peter R. 546; 1 Kent, 342; Sergeant Const. ch. 21; 6 Wheat. 297, 5 Wheat. 27; Johnson and Story, Justices; Duponceau, 90; Rawle, 191.)

In a case of somewhat kindred features to this, Chief Justice Marshall says, "that the admiralty jurisdiction can be exercised in the states in *those courts only* which are established in pursuance of the 3d Article of the Constitution. (1 Peter. R. 546.)

This would deny to Congress the power of authorizing any state tribunal, as such, to take cognizance of cases of admiralty jurisdiction; much more would it militate against the right of any state to exercise such power of its own authority. Nor does this doctrine infringe upon that laid down in various decisions, particularly with respect to criminal offences, that there may be a capacity in the United States judiciary by the terms of the Constitution to exercise a jurisdiction, which must nevertheless lie dormant because Congress has not designated the offence, or the manner in which the court shall act upon it, (3 Wheat. 386; 5 Wheat. R. 76,) because the aid of any authorization by Congress is not deemed necessary to perfect the jurisdiction of the court in civil cases of admiralty and maritime jurisdiction. (4 Cranch, 2.)

3d. The third and last general objection to the action is, that by the laws of the state of New-York, under which the libellants were commissioned, they were bound to render the services performed by them and can only be compensated therefor conformably to the provisions of the state law.

This objection rests upon two propositions. (1.) That a public officer is bound to perform all the duties of his office, for the compensation appointed by law for such services, and can claim nothing beyond such stated compensation. (2.) That the mode in which his compensation is to be ascertained being fixed by law, he can avail himself of no other mode of determining the amount.

U. S. District Court.—Hyer and others v. The Schooner Wave.

1. The first position is well founded in reason, and is no doubt sustained by the general principles of law. It has been applied by an eminent judge to deny salvage in a case where an individual derived extraordinary benefit from the services of a public officer. The officer being in the execution of the duties of his office happened to render meritorious service to property in peril, and afterwards libelled it for salvage. Judge Washington decided that he could not sustain the claim. (3 Wash. C. R. 569.) The language of the court would, however, seem to imply that if the direct object of the officer had been to preserve the property, he might have been entitled to salvage for such special service, notwithstanding his official authority over or connection with the subject.

In order to apply the rule of law to the case before the court, it is necessary to ascertain with precision the nature and extent of the duties imposed upon the libellants, by their offices of pilots, and how far they are to be regarded as acting in this behalf as public officers. Pilots, in maritime law, are persons taken on board at a particular place for the purpose of conducting a ship through a river, road or channel, or from or into port. (Abbott, 148 ; Jacobson, 125, 127.)

In this capacity they have the entire command of the vessel, whilst under weigh, in her navigation, and in selecting the place and determining the manner of bringing her to anchor.

But the pilot is subordinate to the master, in all other respects, who has the control of the vessel and crew, and is to be obeyed as to the destination and disposal of her, and the time of making sail and coming to. (Abbott, 226 ; *Benj. Franklin*, 6 Rob. R. 350.)

The authority of the pilot being then limited, by the law maritime, to the navigation of the vessel, his duties and responsibilities *as pilot* would accordingly be bounded by the same limitations. If any further duty was imposed upon the libellants in the present case, it must be by some provision of positive law. This will lead us into an inquiry as to the situation in which the subject has been placed by statute.

From the year 1731 statutes have been in force in this state, in relation to the pilots of this port. The colonial law was re-enacted by the state legislature, after its independency, and has continued in substance the same to the present day. Slight variations have occasionally been introduced as the acts passed under review, but nothing essentially changing the general features of the system. (2 Liv. & Smith, ed. L. N. Y., 200 ; (51 Geo. 2.) ch. 565 ; 2 Van Schaick's ed. 433 ; Sess. Laws, (15 Geo. 3.) ch. 79 ; 1 Jones & Varick, 120 ; 2 Kent & Radcliffe, 133 ; 5 Webster & Skinner, 11.)

So also the other maritime states had, previous to the Federal Constitution, adopted provisions regulating pilots within their respective territorial jurisdictions.

The main purport of the various acts was to provide for the appointment of competent pilots ; to declare the manner in which their services should be performed ; to fix their compensation, and, in some instances, the mode of recovery.

U. S. District Court.—Hyer and others v. The Schooner Wave.

To obviate all question as to the effect of the state laws after the United States government went into operation, Congress, at its first session, passed the act of August 7, 1789, by which it was enacted, "That all pilots in the bays, inlets, rivers, harbors and ports of the United States, shall continue to be regulated in conformity with the existing laws of the states respectively, wherein such pilots may be, or by such laws as the states may hereafter respectively enact for the purpose, until further legislative provision shall be made by Congress."

The power of Congress to adopt in this manner the prospective legislation of the states need not be questioned in the present case, because the state statute then and now in force being essentially the same, it is unimportant which is regarded as the rule of decision.

The state act of February 19, 1819, according to the terms of the act of Congress, would be the one now in force. At all events, it is the one set up by the claimants as prescribing the duties pilots are to perform, *virtute officio*, and as debarring these libellants from all other recompense than that given by the statute.

The general duty of this class of pilots, so far as defined by that statute, are, to pilot vessels from New-York to sea, and *from sea to New-York, by the way of Sandy Hook*; to keep and maintain in the *piloting service* to and from the port of New-York by way of Sandy Hook, not less than five good and sufficient pilot-boats, &c.; to exhibit their printed instructions to masters of vessels when they board them, and to govern themselves by these instructions.

The 9th section of the act empowers the Board of Wardens to adopt such rules as they may deem proper for the government of pilots and to revoke or amend them at discretion. A body of rules adopted by the wardens on the 16th of April, 1819, were offered in evidence, but as they were revoked by subsequent rules, adopted June 19, 1819, they cannot be regarded as applicable to this case further than they may aid in the interpretation of those now in force.

The 4th Rule of June, 1819, provides, that "*vessels that approach the coast in distress*, shall have the preference of others, and pilots are required to go on board such vessels appearing *in distress and in want of a pilot*, in the first instance and render her every service or assistance in their power."

The 19th section of the statute enacts, "that the master, owner or consignee of any ship or vessel *appearing in distress and in want of a pilot*, on the coast, shall pay unto such branch pilot or deputy pilot, who shall have exerted himself for the preservation of such ship or vessel, such sum for extra services as the said master, owner or consignee and pilot can agree upon; and in case no such agreement can be made, the board of wardens shall determine what is a reasonable reward, and the sum so determined by them shall be paid in manner aforesaid."

It would seem very manifest that the legislature, in the provisions of the above section, and the wardens in the rule promulgated by them, contemplated no other than mere *pilot services*.

U. S. District Court.—Hyer and others v. The Schooner Wave.

The expressions are aptly selected to convey that meaning; and there is nothing in the language used, or the subject matter, from which an intention may be inferred, to embrace other cases than those where the professional assistance of the pilot is wanted.

Had the legislature intended to constitute the pilots *wreckers* also, a very different form of expression would have been proper and necessary. The pilots are required to go on board of vessels in distress and *wanting a pilot*; if they are in a predicament where a pilot, as such, can be of no service to them, the case has not occurred, pointed out by the rule or statute, in which the pilot is compelled, *ex-officio*, to go to their aid, whatever may be their distress.

It appears to me that no other construction can be given to the rule or statute, consistent with the plain import of the language and the purpose those laws were designed to answer than to limit their operation to the cases where the skill and experience of the pilot in the immediate duties of his office are required. A vessel on shore, or wrecked, or so disabled as not to be navigable, would stand in no need of the officers created by this law, or the peculiar skill which they are appointed to exercise. Any able bodied mariners would be equally serviceable to her as a pilot.

So, in the present case, if the Wave had sailed with a pilot on board and met with this disaster, she would have wanted the relief the libellants afforded her no less on account of having such pilot; and yet no one will contend, that when a vessel is already provided with a competent pilot, the law exacts the duty of any other pilot to go on board of her.

Besides, he is not required by law to take with him his boat's crew, or any person, to assist in manning or navigating a vessel in distress; nor is he bound to employ his boat in her aid, further than to put him on board. We are not discussing the obligations of humanity, but the extent and character of those duties enjoined upon pilots by virtue of their offices. The statute requires the boats to be kept in the *piloting service*. That service manifestly is, to cruise between points where pilots are put on board and taken off from vessels, prepared to furnish pilots to vessels coming in, or take them from those going to sea.

It would be foreign from that service to lade the boats with wrecked goods, or send them into port with the cargoes of vessels requiring to be lightened; and the special duty to which pilots are appointed, and for the performance of which they are to supply boats, must be abandoned to enable them to engage in that of wreckers.

If the true construction of the law, and the regulations, obliges a pilot-boat's whole company, together with the boat, to be devoted to the relief of a vessel situated as the Wave was, then this duty must be discharged, although at the same time other vessels should appear off the coast wanting pilots, and such vessels must be left to the peril of their situation, whatever may be the consequences.

This is not the view I take of the law. In my judgment, no pilot

service was performed in this case ; and if the libellants neglected vessels coming in and wanting them to undertake the saving of the *Wave* and her cargo, they would have forfeited their commissions, and, probably, been personally subjected to damages.

So far from enjoining this species of service on pilots, I think the law and regulations are so framed as to be clear of doubt, that nothing beyond the skill and exertions of the individual pilot on board a vessel, is provided for or contemplated.

When not neglecting the specific duties of his office, a pilot may engage in a case of salvage, and he stands in respect to it upon the same footing as other mariners.

There are other considerations conducing to prove that the present case is not embraced within the purview of the state law : First, because it is extremely doubtful whether the libellants, if they had done nothing on board this vessel but as pilots, could charge or receive pilotage for bringing her back to the city.

The second proviso to the 22d section is, “ that no pilotage what-ever shall be demanded or *received* by any such pilot for any such “ ship or vessel *coming into* the said port of New-York, unless such “ pilot shall take charge of such ship or vessel to the southward of “ the upper middle ground, and such vessel be at least of the burthen “ of *seventy tons* unless such vessel shall make the usual signal for a “ pilot, &c.”

Now although the court should judicially take notice of the topography of the bay and decide that this vessel was to the southward of the upper middle ground, yet she was making no signal for a pilot ; nor was she *coming into* this port, nor is there any evidence that she was of seventy tons burthen.

If this upon the facts is not a case in which pilotage fees could be demanded, then most manifestly the *extra compensation*, provided for by the 19th section, would not apply to it, for that is given only where the pilot has exerted himself for the preservation of a vessel *wanting a pilot*. Whatever may have been the magnitude or value of the services, they would not come within the description of those which the board of wardens are authorized to reward.

It will accordingly be unnecessary to inquire how far it is competent for a tribunal created by a state law, to exercise a portion of the admiralty and maritime jurisdiction conferred by the constitution, on the judiciary of the United States, or what effect or influence the existence of the court or board of wardens would have in ousting the jurisdiction of this court in the recovery of pilot fees, inasmuch as this case is not shown to be one which the state law has given that tribunal authority to dispose of. And although I entertain no doubt of the authority of this court to afford pilots a remedy for fees, yet under the present posture of this cause, there would be great difficulty in bringing the acts of the libellants within the provision of the statute providing fees for pilot service, or the general principles of maritime law in regard to pilotage.

Secondly. It is furthermore exceedingly doubtful whether any inter-

U. S. District Court.—Hyer and others v. The Schooner Wave.

pretation can be given to the state act, consistent with its general scope, and various expressions which does not limit the extra compensation to be awarded by the wardens, to services rendered vessels *coming on to the coast from abroad*. So also the wardens understood it, for their instructions apply only to vessels being *out of port* and seeking to enter it.

My opinion upon the whole case is, that this is a case not of pilotage, but salvage service, and that the libellants are entitled to recover salvage for the services rendered the vessel and her cargo, although *infra fauces terræ*, or on waters within the territorial limits of New-York or New-Jersey. The only remaining inquiry is, what amount shall be awarded them.

Various considerations are regarded by the court in exercising its discretion in fixing a salvage compensation.

The most prominent are, the peril the property was subjected to; the means possessed for its rescue; its value; the degree of labor and hazard the salvors encountered; the value of their property exposed by the undertaking, and the interests of navigation and humanity concerned, in holding out liberal encouragements to induce persons to attempt the relief of vessels and their crews in distress.

Enough has been before stated to show that the Wave, when relieved by the libellants, was in a situation of great peril; it was mid-winter; the bay full of ice, and and a heavy wind blowing. It was also late in the afternoon of the day. There was no vessel, except that of the libellants, any where in sight, and the crew testify that they were already so exhausted by their labors, that they could not have kept the Wave afloat more than an hour and a half longer.

It is however suggested in some of the proofs, and was much pressed in argument, that the necessity for the interference of the libellants was not so imminent, as the Wave had anchored at so short a distance from shore, that she might have been easily beached, and her cargo and crew probably saved, without loss or serious risk.

The argument rests upon mere supposition. The ice made out some distance from the shore and there is no evidence that it could have been penetrated by the Wave, or that she could touch ground before reaching it; nor was she in a condition to make the effort; she was water-logged, had lost her steerage, and her crew depose, that when she anchored, they dared not bring her on the wind for fear she would capsize. These facts show that if she was not entirely unmanageable, it would have been a very dangerous, if not hopeless attempt to endeavor to run her on shore.

But furthermore, admitting she could have been run aground, we are not only to regard the existing perils surrounding her, but how far her condition would probably be benefitted by that change, ought also to be taken into consideration. The wind was from the north-east through that night, with a heavy fall of snow; the next day and day after it blew with great violence, so that the Wave required both anchors to secure her in the anchorage to which the libellants had taken her and where she had the advantage of land shelter.

U. S. District Court.—Hyer and others v. The Schooner Wave.

The opinion of some of the witnesses is, that she could not have stood the gale at all if aground in her unsheltered position, and must have immediately gone to pieces. In such case both vessel and cargo must have been totally lost, and very little chance would exist for saving the lives of the crew.

The services of the salvors must accordingly be esteemed meritorious on their part, and of extreme necessity to all interested in the Wave. They were rendered with great promptitude, skill and diligence so as not only to save the property, but to secure it against the injury it was then incurring. The cargo saved, after all damages deducted, was appraised at \$9537 86-100, and the vessel at \$1500.

Although the claimants were thus benefitted by these services, no serious personal risk or hazard of property was encountered by the libellants. They loaded the pilot-boat, stopped the leak of the Wave and got both vessels under weigh in about three hours. During that time they labored with great activity and good judgment. Every man was employed to the extent of his ability. Some additional fatigue and delay were also incurred in towing the Wave and in being obliged to come to anchor with her once, before reaching Prince's Bay, not attended, however, with any extra hazard of life or property. Their boat was valued at from \$2500 to \$3000.

These circumstances show nothing exalting the salvage in this case to one meriting a prodigal reward.

Courts do not look alone at the benefit received by the owner of the property saved; they regard also the character of the service and the degree of compensation which would, under like circumstances, usually command similar relief.

I shall decree that the libellants receive 1-10th part of the value of the vessel and cargo as appraised.

I might feel supported by authority in giving a larger compensation. Lord Stowell allowed a king's ship, for saving a merchantman, 1-10th of ship, cargo and freight. (*Mary Ann*, 1 Hagg. 158.) Judge Hopkinson allowed above 1-9th of all saved, *to pilots*, where the services were very trivial and not of indispensable necessity to the vessel. *Hand v. Schooner Elvira*.

But the value of the property saved in this instance, makes, in my estimation, the compensation to the libellants at 1-10th, adequate to the services rendered. The share allotted to the apprentices, is not to be paid to their masters, but to them individually. (2 Cranch, 260.)

Decree accordingly, with taxed costs to the libellants, and \$50 for counsel fees, &c.

(Decree *at large*.)

The following decisions respecting the admiralty jurisdiction of the United States Courts, and the rights of pilots as salvors, have been made since the delivery of the above opinion. *Waring et al v. Clark*, 5 Howard 451, 6 Howard; *Hobart v. Drogan*, 10 Peters U. S. Rep. 108; *The General Palmer*, 2 Hagg. Ad. Rep. 177, 178; *The Fun-chall*, 3 Hagg. 386; *The Elizabeth*, 8 Jur. 365; *The Frederic*, 1 W.

Court of Appeals.—The Cayuga County Bank v. Warden and Griswold.

Rob. 17; *The Hebe*, 2 W. Rob. 246; *The Cumberland*, 9 Jur. 191; *The Dossetil*, 10 Jur. 866, S. C. 5 N. Y., Leg. Obs. 110; *New-Jersey Steam Navigation Co. v. Merchants' Bank*, 6 How. U. S. Rep. 378.

In the Court of Appeals.

THE CAYUGA COUNTY BANK V. ETHAN A. WARDEN and FRANKLIN L. GRISWOLD.

A defective and insufficient notice of protest may be aided, and helped out by accessory facts. The question whether an endorser of a promissory note has been duly charged as such, does not depend on the fact whether the note was correctly described in the notice of protest, but on the mind or knowledge of the endorser. It seems that any notice of protest, however defective, will be held sufficient, if when taken in connection with accessory facts, it conveys to the mind of the endorser, information of the identical note, intended to be protested.

It seems also that a notice of protest may vary according to each particular case, or the education, intelligence or quickness of comprehension of the endorser, as its sufficiency depends upon the information which it conveys to his mind.

A notice of protest need not show that a demand of payment of the note has been made, that is matter of evidence, to be given at the trial.

A notice of protest, describing a *joint* endorsement, as an *individual* one, is sufficient to charge the *joint* endorsers of a promissory note.

THE defendants were sued as the *joint* endorsers of a *six hundred dollar* note. It was in the words and figures following, to wit:

“\$600.

“Ninety days after date, I promise to pay to the order of F. L. Griswold and E. A. Warden, six hundred dollars, for value received, at the Cayuga County Bank. Auburn, N. Y., January 30, 1845.

Signed, “S. WARDEN.”

Endorsed, “F. L. GRISWOLD,
“E. A. WARDEN.”

The cause was tried at the Cayuga Circuit in January, 1848, before the Honorable JOHN MAYNARD without a jury.

On the trial of the cause the plaintiffs proved that the notice of protest served in this case was directed to *each* defendant *individually* and not to them *jointly*, and was in the words and figures following, to wit:

“Cayuga County Bank,
“Auburn, March 3, 1845.

“\$600.

“SIR—Take notice that S. Warden's note for *three hundred* dollars payable at this Bank, *endorsed by you*, was this evening protested for non-payment, and the holders look to you for the payment thereof.

“Your Obedient Servant,

“P. B. EATON, Notary Public.”

The plaintiffs then proved, under objections, by defendants' coun-

sel, that Satterlee Warden, the maker of the note, had no other note in the bank, on which the defendants were endorsers. That Satterlee Warden resided in Tennessee, and had resided there about four years. That the note in question was given in renewal of a former note. That Griswold only attended to the renewal. That the previous note was for \$665 51 and was due the 11th of November, 1844, and was made by S. Warden. That it was renewed by the note in suit and the payment of \$665 51.

The defendants then proved that the note for \$665 51 was given to renew a note for \$750 discounted by the plaintiffs about the 26th of April, 1844, which note was given for two notes, one against Leonard & Warden, and one against Warden & Satterlee for \$384 06 each. That the defendants were endorsers on the note given by Leonard & Warden and the defendant Griswold was alone the endorser on the note given by Warden & Satterlee. That both of the \$384 06 notes were dated November 12, 1843, and that the Warden, who composed one of the firm of Warden & Satterlee and Leonard & Warden, was not the same Warden who endorsed the note in question.

John Porter, for plaintiffs.

Warren T. Worden, for defendants.

JEWETT, Ch. J.—There is no question but that due presentment for payment and notice of non-payment to the endorsers of a promissory note, are conditions precedent to the liability of the endorsers, and that the notice may be either written or verbal. *Cuyler v. Stevens*, 4 Wend. 566. Such presentment of the note in question was made, and notice of non-payment in the form shown by the evidence given. The only material question then is, whether that notice is sufficient. It is well settled that there is no precise form of words necessary to be used in giving notice; it is sufficient if the language used is such as in express terms, or by necessary implication, to convey notice to the endorsers of the identity of the note, and that payment of it, on due presentment has been neglected or refused by the maker.

The fact which was necessary to be established by the plaintiffs is, that the defendants had due notice of the dishonor of the note in question. The notice, such as it is, was given at the precise time and place required by law. The evidence shows that this note was given for a balance due upon and in renewal of a former note, payable at the same bank on the 11th of November, 1844, made by S. Warden and endorsed by the defendants, to whose order it was made payable. But it is contended that the notice merely informs the defendants of the non-payment of a note drawn and endorsed respectively by the defendants for \$300, and not of a note for \$600, endorsed by the defendants jointly. Concede that such variance or misdescription exists; it is well settled in accordance with good sense, that an immaterial variance in the notice will not vitiate it, it must be such, as that, under the circumstances of the case, conveys no sufficient knowledge to the

endorsers of the identity of the particular note which has been dishonored. *Mills v. The Bank of the United States*, 11 Wheaton, 431. *Bank of Alexandria v. Swann*, 9 Peters 33.

Now having the accessory facts, namely, that this was the only note in the bank drawn by S. Warden and endorsed by the defendants, and the intimation conveyed by the figures, "\$600," upon the margin of the notice, who can doubt but that *this notice* conveyed to the mind of the defendants the information that this identical note had been dishonored, although it misdescribed the note, as it respects the sum for which it was made in the body of it. The defendants, knowing the facts stated on the receipt of *this notice*, could not, as it seems to me, fail to be apprized by it, that this particular note had been dishonored. It was said on the argument, that the notice to be effectual must be perfect on its face, to convey the information to the endorsers of the non-payment of the note, and that it could not be aided by accessory facts. The cases of *Shelton v. Braithwaite*, 7 Mees. & Welsb. 436; and *Stockman v. Parr*, 11 Mees. & Welsb. 809, are very much in point, to show that a notice defective on its face may be aided by such facts, and that it is proper to consider them in deciding the question of the sufficiency of such notice.

It was also contended, that the notice is fatally defective and insufficient to charge the defendants as endorsers of the note in question, on the ground that the notice describes the endorsement of the note, as an individual and not a joint endorsement. The note is drawn payable "to the order of F. L. Griswold and E. A. Warden," and is endorsed by the payees respectively. In such case, the law requires notice to be given to each of them, as notice to one will not, as it will in the case of partners, be deemed notice to the other. *Willis v. Green*, 6 Hill, 232.

The objection rests upon the ground of misdescription of the note in question, that the receipt of the notice did not and was not calculated to *inform the* defendants of the non-payment of the note, that to effect such object, the notice should have described the note as having been endorsed by both defendants. It seems to me that to hold in conformity with this objection, would be to sacrifice substance to the merest technical formality, and it is quite impossible not to see that, *under the circumstances of this case*, the notice fully informed the defendants that this particular note had been dishonored.

Another objection to the notice is, that it does not state that payment of this note was ever demanded, or that it was refused, nor *when* nor *where* such demand was made and payment refused. The notice is dated "Cayuga County Bank, Auburn, May 3, 1845," and states, that S. Warden's note for \$300, payable at this bank, endorsed, &c., was this evening protested for non-payment, and the holders look to you for the payment thereof.

The case of *Mills v. The Bank of the U. S.*, 11 Wheaton, 431, shows that it need not be stated in the notice that a demand of payment was made, that it is sufficient to state the fact of non-payment of the note, which the notice in this case alleges, it states that the

N. Y. Oyer and Terminer.—The People v. Austin.

note was protested for non-payment. Whether the demand was duly and regularly made, is matter of evidence to be given at the trial, and to the same effect is the case of *Stocking v. Collins*, 9 Carr. & Payne, 653.

I am of opinion that the notice under the circumstances of this case was sufficient, and that the court below erred in its judgment. That it should be reversed with a *venire de novo* by that court, and that the costs should abide the event.

NOTE.—See *Remer v. Downer*, 23 Wendell, 620. *Renson v. Mark*, 2 Hill, 587. *Platt v. Drake*, 1 Douglass, Michigan R. 296.

N. Y. Oyer and Terminer.

Before the Honorable J. W. EDMONDS, one of the Justices of the Supreme Court of New-York, and Aldermen STEVENS and DODGE.

THE PEOPLE v. JOHN S. AUSTIN.

Where an indictment contains several counts charging the same offence in different forms, the prosecution will not be compelled to elect on which count they ask a conviction. Such election will be directed only when the several counts charge separate and distinct offences. It is not collateral but relevant to the main issue to inquire into the motives which influence a witness in giving his testimony, and a party examining a witness in regard to them, is not bound by his answers but may contradict him.

A sufficient foundation is laid for such contradiction if the attention of the witness has been directed to the time, place and circumstances attending an alleged statement made by him, and the name of the person to whom he may have made it, need not be mentioned, if it was not necessary to enable him to know to what remark his attention was directed.

The statute allowing the relative of a person killed, to recover damages therefor, it will be no impeachment of a witness, that he as a father of the deceased had attempted by negotiation to recover compensation from the author of the death.

Whether a homicide was justifiable under the statutes is to be determined by the jury from their conviction whether there was reasonable ground for the accused to apprehend great personal injury, and not from the fact that the accused did in fact entertain such apprehension.

Whether a homicide is excusable or not, must depend in a great measure upon the nature of the weapon used and the manner in which it was used. Killing by intentionally firing a pistol into a crowd cannot be said to be by accident or misfortune. To constitute murder there must be an intention to kill, in all cases, except where the perpetrator is at the moment engaged in committing a felony.

Any killing without a design to effect death unless it is justifiable or excusable is manslaughter only.

Implied malice, constituting killing without an intention to kill murder, is not recognised in our law.

Recent provocation, and the fact that the passions have not had time to cool, do not under our statute mitigate a killing with a design to effect death from murder to manslaughter. Such killing is murder, whether the design to effect death was formed on the instant or had been previously entertained.

The intention to take life constitutes, under our statute, the main distinction between murder and manslaughter.

THE prisoner was indicted with one Nesbitt, for the murder of Timothy Shea, on the 28th of September, 1848, by firing a pistol at him.

The indictment contained two counts, one charging that the pistol was fired by Austin by the aid and procurement of Nesbitt, and the other that the firing was by Nesbitt, and that Austin aided and encouraged.

After the testimony for the prosecution closed, which tended to show that Austin had fired the pistol, *J. Graham*, for the defence, moved that the prosecution be put to their election on which count they intended to ask for the conviction of the prisoner. He insisted that the prosecution having now got in all its testimony was able definitely to inform the prisoner of the precise nature of the charge of which they claimed him to be guilty and that it was his right to know so as to determine how to shape his defence.

H. G. Wheaton, (who appeared instead of the Attorney General,) insisted that the right to compel an election existed only when the indictment contained distinct charges, and not where, as in this case, it contained only charges connected with the same transaction.

EDMONDS, J.—That is undoubtedly the true rule where the two offences charged form parts of one transaction, yet are of such a nature that the defendant may be found guilty of both. The prosecutor will not be called on to elect upon which charge he will proceed, for in such case the joinder of counts cannot prejudice the defendants, which is the only ground on which this application to the discretion of the court can be founded. The right of election is confined to cases where the indictment contains charges which are actually distinct and grow out of different transactions. Thus the prosecution will not be compelled to elect on an indictment charging both larceny and receiving stolen goods, where it appears by the indictment that the charges relate to the same transaction modified to meet the proof, nor when several counts are inserted in an indictment solely for the purpose of meeting the evidence as it may transpire on the trial, the charges being substantially for the same offence. Such is this case, and the impropriety of compelling an election here is very apparent. If the prosecution should elect to go on the count that charges Austin with having fired the pistol, and it should turn out on the trial that it was in fact fired by Nesbitt, but by the order and procurement of Austin, Austin would be guilty of the murder, yet could not be convicted because the prosecutor had been compelled to elect, and in a necessary ignorance of the facts had elected the wrong count.

The prisoner cannot be embarrassed by being tried on both counts, while the prosecution may be much embarrassed and indeed entirely thwarted by being compelled to elect.

The motion must be denied.

John Shea, the father of the deceased, was examined as a witness on the part of the prosecution, and on his cross-examination was asked whether he had not offered to the prisoner or some of his friends to leave the state and refuse to testify in the case for a suitable remuneration. To which he had answered not exactly that, but — and was then proceeding to detail what he had said in that regard, when he was stopped by the prisoner's counsel, and told that they had got all the answer they wanted.

On his re-examination by the prosecution he was asked what it was he had said in that regard.

D. Graham, for prisoner, objected.

EDMONDS, J.—But you have yourselves introduced the subject and have obtained only part of an answer. The whole of it ought to be got out. Besides, you have an answer from which you may call on the jury to infer corruption on the part of the witness, while the matter may be susceptible of a perfect explanation. It will be right to have it all.

Being examined on that point the witness detailed two interviews with one who acted as an agent of the prisoner in conducting his defence, in which, as he alleged, an offer had been made to him of some money if he would remove from the state.

After the prisoner had entered upon his defence his counsel offered to prove several acts of this witness going to show a desire to obtain from the prisoner pecuniary satisfaction for the injury which he had received by the death of his son, and what had taken place between him and the prisoner's agent in that respect.

Wheaton, for the prosecution, objected that the examination of the witness on this subject had been to a matter entirely collateral to the main issue, and that the defence were therefore bound by his answers and could not contradict them.

D. Graham, for the prisoner, contended, first, that it was not collateral matter so that the defence was bound by the answer, and, second, that the testimony was proper independent of what the witness had said on his examination, as it might tend to show him governed by corrupt or revengeful feelings, and it would enable the jury to judge what credit to give him when they should learn that he had attempted to make money out of a transaction which had resulted in the death of his son.

Wheaton, in reply, said that since our statute of 1847, which had given to the relatives of a person killed under circumstances which would constitute a trespass, a right to recover damages for the injury sustained by the loss of the deceased, it could be no impeachment to the credit of a witness to seek to avail himself of the benefit of the statute.

EDMONDS, J.—I was not aware that the statute gave the remedy for damages in such cases as this. I supposed it was confined to cases of persons travelling in public conveyances. It grew out of injuries on rail-roads and steamboat accidents, but I see that it extends to all cases where death is caused by the wrongful act, neglect or default of any person or corporation, and the party injured, if living, might have maintained an action for the injury. And it is worthy of note to observe this return to a law which once prevailed among our ancestors, but which has been exploded for several hundred years. The *Wergild* of our Saxon ancestors was the fine set on

N. Y. Oyer and Terminer.—The People v. Austin.

a person's head for the murder of a man. Tacitus speaks of it as having been found by the Romans to exist among the Northern Germans, from whom it was doubtless brought into England by the Saxons while pagans, and continued even after the Norman conquest until the introduction of the Christian religion, when it fell into disuse, it being regarded as contradictory to the divine law. Some years since I found the same law in existence among the northern native tribes on our continent.

I once witnessed on the island of Michilimackinac the interesting ceremony of the "Wergild" performed among some Indians inhabiting the borders of Lake Superior, and I had several times occasion in my then official capacity in settling claims against Indians, along that region of country from Lake Winnebago to Lake Superior, to make similar allowances which I found was in pursuance of a well settled custom among them. But this is a digression, perhaps not an unnatural one. It is enough for the question now before me to know that such a law now prevails among us also, so that it could in no respect affect the credit of this witness that he was seeking to avail himself of its advantages. Yet if there was no such statute, this question has been settled by our court in 11 Wend. *The People v. Gemung*. That was an indictment for false pretences, and the defendant offered to show that during the sitting of the court the prosecutor had offered to the prisoner that if he would settle the subject matter of the indictment he would leave the court and not appear against him. The testimony was excluded and the Supreme Court sustained the decision on the ground that if the fact had been proved it could legitimately have had no influence with the jury, for it did not tend in the least degree to impeach the testimony of the witness or to show that his narration was not true. So far then as to one view in which this evidence is offered, namely, as independent of what the witness may have testified on the subject, the testimony would not be proper. But when offered to contradict his testimony, it has a different aspect. In the view which I have already stated, the question put on the cross-examination of this witness might have been objected to and perhaps excluded. But it was asked and answered without objection and the inquiry was fully gone into on both sides in order to ascertain the feelings with which he testified. That surely cannot be called collateral, for any inquiry which is allowed having that object in view is pertinent and relevant to the main issue. In regard to such matters it is always open to contradict what the witness himself has said on the subject. With that view and to that extent the inquiry will now be allowed.

The witness John Shea, on his cross-examination, had been asked whether on the evening of the affray and immediately after his son had been shot, he had said to two men in his basement that he did not know who had fired the pistol? To which he had testified that he had not said so, but a good many persons had spoken to him that evening, that he did not know whether they were friends or enemies and had not been always particular as to what he did say.

For the defence a police officer was introduced who said he entered the basement directly upon the first alarm and saw the dead body lying on the floor, and had asked some questions of the witness Shea. His answers being offered in evidence,

Wheaton, for the prosecution, objected, because the proper foundation had not been laid, as the attention of the witness had not been particularly called to the police officer by name.

EDMONDS, J.—His attention was challenged to the particular circumstances and occasion, to every thing indeed, except the name of the person to whom it is now alleged he made the declarations offered in evidence, so that he has had a full opportunity of recollecting and explaining what he has formerly said. The main thing is first to ask him, whether or no he has said or declared that which is intended to be proved. All that has been done in this case, and the only omission has been the name of the person to whom the remark was made, and that person an entire stranger to the witness. That name was not necessary to enable the witness to know to what remark his attention was directed. The time, place and circumstances were all specifically mentioned, and they were enough to give him the required opportunity of explanation, having that, this inquiry now becomes proper.

The evidence bearing on the offence charged in the indictment went to show, that on the evening in question the prisoner, with three of his companions, sallied out into the streets on a frolic, and after visiting five or six drinking houses entered one in Leonard-street, next door to the residence of the deceased, and on coming out passed the door of the basement occupied by the deceased's mother as a porter-house, and in which the deceased, two of his brothers, and a sailor were then engaged singing and carousing. As Austin was passing the door one of the inmates came out and invited him to go in and hear the singing which he refused to do. After refusing repeated invitations, he was taken by the collar and dragged into the basement. The door was then shut upon him and he was repeatedly urged to sing or to drink, but refused. One of his companions, the other defendant, Nesbitt, followed him into the basement and attempted to fasten the door open. A row then began, in the course of which Nesbitt fled from the room and the brother of the deceased threw a tumbler and a pitcher at Austin and struck him a severe blow on the forehead with a decanter. Austin retreated from the basement, he was followed by the sailor and struck a blow with a chair. At about this time, but whether before or after the blow with the chair was not ascertained, some one fired twice into the basement from a six barrelled revolving pistol. One of the balls took effect upon the deceased, who was then advancing with a chair uplifted towards the door through which Austin had retreated, and who died almost immediately, exclaiming as he fell and expired, "Father, I am shot." At about the same moment, but whether before or after the firing, the light

in the basement was extinguished. It was from a lamp hanging over the bar, so low that Patrick Shea who was standing by the bar, could easily extinguish it with a breath. After the firing, the prisoner retreated towards the Police Station House, distant about 100 feet from the scene of the affray. On the way which he had passed a pistol was afterwards found. Austin repaired directly into the Station House, where he was met by the Captain of the Police, who, observing him to be very bloody, ordered him to be taken care of and a physician to be sent for. On examining him it was found that he had received a very severe wound in the forehead with some sharp instrument which had cut through the rim of his hat and which stupefied him, a hole was cut through one cheek, as if by a stab from an oyster knife, and various bruises on his head and body showing that he had received at least nine blows. He was too ill from these wounds to be removed from the station house for several days, and several weeks elapsed before he arose from his bed.

There was much contradictory evidence in the case. The father of the deceased swore positively to his having seen the prisoner fire the pistol from the side walk, after the affray was over, while other witnesses testified that he was an habitual drunkard, that he had gone to bed very drunk that afternoon and was asleep in another room when the affray began and was just rising from his bed as his son expired.

It was also proved that the family of the Sheas, was very debased, the daughter being a strumpet, the mother sharing with her the wages of her prostitution; the deceased had been a convict in the state-prison, and his brother, one of the witnesses, was then in confinement on a charge of stealing, and that the house they kept had frequently attracted the notice of the police for its riotous and disorderly character.

D. and J. Graham, of counsel for the prisoner, made the following points:

I. In order to make homicide, by an act imminently dangerous to others, murder, it must be occasioned by an act committed when the mind is in the same mood as would be necessary to make the act murder if it was committed upon a particular individual, and there must be a pre-intention to take human life, or else to do the act which must necessarily or may result in the death of some one.

II. If the jury believe that the defendant fired the pistol, smarting under a provocation so recent as not to be under the influence of reason, it is not murder.

III. If the jury should believe that the statement of John Shea, as to the door's being opened after Austin was put out, and the pistol discharged into the basement, it would not be murder unless the time that elapsed between the defendant's becoming disconnected from the violence of the inmates of the basement and the firing of the pistol was a reasonable time for the cooling of human passion.

IV. If the jury believe that the pistol was fired from the street, i. e.

outside of the basement, and that the defendant was pursued there by the violence of the inmates of the basement, and that there was reasonable ground for supposing, that great personal injury would be done to him, and imminent danger of its being accomplished, it would be justifiable in law.

V. If the judgment of the defendant was so impaired by the violence of the injuries inflicted upon him, that the act of firing the pistol, though not necessary to guard himself against further injury, was rather the result of *instinct* than judgment or *revenge*, the act would be justifiable in law.

VI. Where the loss of reason or deprivation of consciousness is the direct result of an injury, and not attributable to mere passion, an act committed while in such a state, is not an offence.

VII. The basement of the Sheas being a public bar room, it was no trespass in the defendant to enter it.

VIII. If the Sheas had the right to eject the defendant from the basement, owing to his misconduct, they were only entitled to use the kind of violence calculated to attain the end. Throwing a tumbler or decanter would not be justifiable, and would make those resorting to them, trespassers.

IX. If the Sheas resorted to excessive or unnecessary violence, for the purpose of ejecting the defendant from the basement, they became trespassers in so doing, and the defendant would have the right to act in self defence.

X. If Austin discharged the pistol under an honest supposition that his life was in danger, or that some great personal injury was about to be done to him, he is not guilty of an offence.

XI. If the defendant, though in no danger of serious bodily harm, through fear, alarm or cowardice, discharged the pistol at the deceased, or into the basement, under the impression that great bodily injury was about to be inflicted upon him, it is not an offence.

J. McKeon, District Attorney, and Wheaton, for the prosecution, made the following points:—

1. If the jury believe the prisoner armed himself with this deadly weapon, with an intent to use it against human life, if he should get into an affray, and was induced or encouraged to provoke the affray in question or unnecessarily to continue it after it had been commenced by others, by the fact of his being thus armed, and did use it against the life of Timothy Shea, in the manner proved by the witness, he is guilty of murder.

2. That if the jury believe the prisoner was so far self-possessed as to be able to restrain his passion while in the basement receiving the blows, although his weapon was then at hand, and omitted to use it till he had got out of the basement and out of the more immediate view of the inmates, and then used it as proved by the witnesses, he has exhibited all the deliberation which the law requires to be guilty of murder.

EDMONDS, J., in charging the jury, said, that the first question for them to determine was, whether the prisoner had fired the pistol. This was sworn to positively by two witnesses. Shea, the father, and Clara King, a girl of the town, who was passing at the moment. The testimony of the father was not to be relied upon. His character, his intoxication, his strong feelings and the falsehoods which had been proved against him, forbid the idea of giving much credit to him. The testimony of the girl, however, had not been impeached, but had been corroborated by several independent circumstances in the case, and particularly by the facts that all the witnesses unite in saying, the firing was from the very spot, where all unite in saying the prisoner was at the time; that the pistol when found was bloody, and that he alone of all the party was bleeding; that he had an inducement to do it, whether from motives of revenge or in self defence; that the direction of both shots was from where Austin was, back upon those who had beat him; that the pistol was found at a spot which he had just passed; that he who fired the pistol wore a white hat, and that the prisoner alone had such a hat that evening. From these considerations, the jury must determine whether it was not the prisoner who fired the pistol, and in determining it, they must bear in mind that the evidence to satisfy them must exclude, to a moral certainty, every hypothesis but that of guilt, that the conviction of guilt must flow naturally from the facts proved and not by a forced or strained construction and be consistent with all the facts, for if any one fact is utterly inconsistent with that conclusion it cannot follow; and that, in case of doubt it is safest to acquit, for the protection of innocence has an equal claim upon the administration of justice with the punishment of guilt.

If upon this question, the conclusion of the jury should be adverse to the prisoner, the next inquiry would be into the nature and quality of the act which should be thus established against him, and whether the homicide was justifiable or excusable, or was murder or manslaughter.

The homicide would be justifiable under our law, only in case it was committed by the prisoner when there was reasonable grounds to apprehend a design to do him some great personal injury, and there was imminent danger of such design being accomplished. But of this the jury were to be judges, not the prisoner, and it was for them to say from all the circumstances proved before them, whether there was reasonable ground for such apprehension, and whether there was at the moment the fatal shot was fired, imminent danger that some great personal injury would have been done to the prisoner.

This would depend mainly upon the facts when and from what position the pistol was fired? If fired after the prisoner has escaped from the party in the house and after he had reached the side walk, it may have flowed from a spirit of revenge for the injuries under which he was smarting.

But if fired before he had extricated himself from the party, who

had thus forcibly drawn him into the building, and had there displayed towards him such unjustifiable violence, he might at the moment have very reasonably apprehended farther personal injury and might be justifiable in using the means at hand to protect himself from it.

There was, however, another view of the case in which the prisoner might be justified, even if he had fired the pistol after he had left the basement. One of the witnesses had testified that the prisoner had been followed from the basement by one of the party inside, and had been struck with a chair while ascending the steps on his retreat. If this were so, then the apprehension of personal injury would not cease with the prisoner's leaving the basement, and the imminent danger in which he had been placed might have continued up to the moment of firing the pistol, and thus he be justified in firing it.

If the jury were not satisfied that it was justifiable, they were next to inquire whether it was excusable? It is so under our law when committed by accident or misfortune, in the heat of passion upon a sudden and sufficient provocation, or upon a sudden combat without any dangerous weapon being used. The nature of the weapon used, and the manner in which it was used, must be mainly instrumental in determining this question. Thus if, in the heat of passion, upon sufficient provocation or upon a sudden combat, a man had used his walking stick, or a butcher in his stall had used his knife that lay near him, or a cooper used the adze with which he was then at work, and had given a blow which was fatal, but without any intention to take life, the homicide might be excusable. But that could hardly be where the weapon used was of a dangerous character, constructed solely for the purpose of taking life and which could scarcely be fired off without hazarding it. If in the melee the prisoner had used the pistol as he might any other hard substance found at the instant in his pocket, by striking a blow with it calculated rather to wound than to kill, but had killed, it might be attributed to accident or misfortune. But that could not with propriety be predicated of the act of intentionally firing the pistol and unless such firing was justifiable, it was either murder or manslaughter.

Whether the act was murder or manslaughter under our statute, depended entirely upon the existence of an intention to kill either some particular person, or generally some one of a number of persons against whom in a mass the fatal act is perpetrated. There is only one homicide known to our law which becomes murder in the absence of an intention to effect death, and that is when the act is perpetrated by one then engaged in committing a felony. Except in that one case, no homicide is murder without an intention to kill and with such an intention, every homicide, with the single exception already mentioned, unless it be justifiable, is murder, whether the intention is formed on the instant or has long been entertained.

Such intention may be inferred from the act itself, for it may be one which of itself plainly indicates a heart regardless of social duty and fatally bent on mischief, and men are to be presumed to intend

the natural and inevitable consequences of the acts which they wilfully perform, but unless there be such an intention, the act cannot be more than manslaughter.

It would readily be perceived that this view of the statute had entirely superseded many of the rules of the law of homicide as it existed in England and which had been quoted on this occasion, and among them the whole doctrine of implied malice and the power of recent provocation to reduce the act from murder to manslaughter.

The English law provided very slight punishment for manslaughter, sometimes as low as the fine of a shilling and never beyond a year's imprisonment. To remove from the operation of so inadequate a penalty acts of peculiar barbarity, such as that of the schoolmaster who whipped a scholar until it died, and that of the master chimney-sweeper whose boy stuck fast in the chimney and was killed by the violent manner in which he was pulled from the place, the English courts adopted the principle of implying malice, where there was in fact no premeditated design to take life. On the other hand, lest such a principle should extend too far, they adopted another principle which gave to recent provocation, and the fact that the passions had not time to cool the power of modifying the acts from murder to manslaughter.

All this had been done away by our statute. If the homicide had been perpetrated without an intention to kill it would be manslaughter and no more, except in the single case of its perpetuation by one engaged in committing a felony. But if perpetrated with an intention to kill, no matter how recent the provocation or how high the passions, it was murder. An act of homicide perpetrated with a premeditated design to effect death, though in the very highest flight of passion, and springing from even an existing provocation, can find no resting place in our statute except under the definition of murder or justifiable homicide, and the intention to kill being established, there is no degree or description of manslaughter in this statute which can embrace it.

That this is the intention of the statute is manifest not only from a careful perusal of all its enactments relative to homicide, but also from the recommendations of the revisors. They proposed that murder should include a homicide when perpetrated from a premeditated design to do some great bodily injury, although without a design to effect death, thus recognising and adopting the principle of implied malice and defending it on the ground that the transaction would be such as would ordinarily lead to the result of taking life. But the legislature refused to adopt the suggestion and enacted a section, which, in the language of the revisors was "founded on the great principle that to constitute murder there should be an express design to take life or such circumstances as to induce a very strong presumption of such a design."

This view of the law will commend itself to our favorable regard, not merely because it confines the crime of murder within its legitimate bounds of a premeditated design to take life, but because it effectually destroys the doctrine of allowing sudden provocation and heat of passion to mitigate the offence, a doctrine most dangerous in its operation, because it tolerates the practice of carrying arms and

N. Y. Supreme Court.—*Hamersley v. Hamersley and others.*

takes from the sudden use of them, the consequences that ought justly to follow. No man can under our laws go habitually armed and in an affray use those arms with an intention to kill, without incurring the hazard of a conviction for murder, and no violence of provocation, no height of passion can mitigate or extenuate the offence. It will be murder if there is an intention to kill, unless self defence demands the sacrifice. The practice out of which this case has sprung is too pernicious to be tolerated. No life would have been taken, if the person who fired the pistol, whoever he might have been, had not gone into the affray with so deadly a weapon. The same remark is applicable to the last case tried in this court and the sooner this law becomes well known, and understood, and rigidly enforced, the better; for far better the land though stricken with poverty, where the unseen majesty of the law affords its sure protection to all, and where the atmosphere of its supremacy pervades every tenement however humble, than that where gold may be gathered at every footstep, but where every man is armed to the death against his fellow, where every breath is drawn amid the rattling of armor, and every pulsation beats with the apprehension of instant conflict.

The inquiry, therefore would be, was there a design to effect death? For if there was, however recent its birth, the offence was murder, but if there was an intention to wound only—a design to do some great bodily harm and not to kill, it was manslaughter and no more.

The prisoner was acquitted.

N. Y. Supreme Court.

Before the Honorable J. W. EDMONDS, one of the Justices of the Supreme Court of the State of New-York.

HAMERSLEY v. HAMERSLEY and others.

Where the plaintiff, in a suit in partition, makes persons defendants who have no interest in the subject matter of the suit, their costs of defending will not be charged upon the fund, or against their co-defendants, but must be paid by the plaintiff personally.

The rule is otherwise, however, if such unnecessary parties are brought in at the request of, or on account of, the other defendants.

THIS was a suit in partition, and it appeared by the bill that the lands in question had belonged to the plaintiff and his brother, Thomas Hamersley, now deceased. That Thomas Hamersley in his will devised his moiety of the property to his executors, in trust, that they should hold the same until his son, Andrew Hamersley, should become twenty-five years of age, and then convey the same to him in fee. It also appeared that the plaintiff, Lewis C. Hamersley, and his son, John W. Hamersley, two of the executors named in the will, had made such conveyance, and that at the time of filing said bill said lands were held by the plaintiff and said Andrew S., as tenants

N. Y. Supreme Court.—*Hamersley v. Hamersley and others.*

in common. Two daughters of the said testator, Mrs. Morgan and Mrs. Terren, and their husbands, were made parties defendants, with an allegation that they claimed some interest in the lands as heirs at law, or otherwise. They appeared by their solicitors, Sandford and Porter.

In his answer, Andrew S. Hamersley denied that the said other defendants had any interest in the lands, and claimed that the one half thereof should be set apart to him, and such was, on the hearing of the cause, the decree of the court. The said answer also set up, that said testator had made provision for his said daughters out of his personal estate, and that the suit brought by the plaintiff to partition said lands was unnecessary, as the defendant had always been willing to divide them with plaintiff without suit.

On settlement of the final decree before Mr. Justice Edmonds, two questions were raised: 1st. *Whether the plaintiff should have any costs, as the suit was unnecessary.* 2d. *Whether the defendant, Andrew S. Hamersley, should be charged with any part of the costs of the other defendants.*

The judge, after deliberation, held that *the plaintiff must be allowed costs, as he had the right to bring the suit, even if the other owner of the lands were willing to partition them without suit.* But that the other defendants, who had no interest in the property, were unnecessary parties, and the plaintiff must pay their costs.

On the application of the solicitor for plaintiff, leave was given him to show that such unnecessary defendants had been put upon the record at the request of Andrew S. Hamersley, and the motion noticed for that purpose now came up for argument.

J. W. Hamersley and Wm. Curtis Noyes, for plaintiff.

Joseph Neilson, for defendant A. S. Hamersley.

EDMONDS, J.—It having been unnecessary to make Terren and Morgan and their wives parties, their costs cannot be charged upon the fund, or upon the defendant, or otherwise than upon him who thus unnecessarily made them parties, unless that was done by the defendant's consent or request.

The whole question then is one of fact, to be made out affirmatively by the plaintiff. His solicitor does not aver that any such consent or request ever was made; but his affidavit, and those of his clerks, state facts from which such consent or request are to be inferred. Such an inference might perhaps justly be drawn, but it is not an irresistible one, and the consent or request is unequivocally denied by the defendant. The affidavits on the other side are as consistent with this denial as with the inference drawn by the plaintiff. If so, the usual rule of evidence denies to those facts the force necessary to overcome this positive denial, and I am compelled, of course, to award that the costs in dispute be paid by the plaintiff.

THE

New-York Legal Observer.

VOL. VII.]

NEW-YORK, MAY, 1849.

[MONTHLY PART.

RECLAMATION OF FUGITIVE SLAVES.

THE Framers of the Constitution of the United States have literally avoided the use of the term slavery, throughout all its articles and amendments. But though its pages do not meet us enstamped with the name of an institution unutterably abominable in the estimation of all honest and faithful friends of Liberty, yet they speak a language whose spirit conveys to the mind ample evidence of its intent and meaning. Although it is not so nominated in the bond, nevertheless we find provisions therein, that can have application to no other well-known and defined object; it cannot be disguised that this great covenant of independent states, recognises as matter of fact the existence, and its right of existence, of involuntary servitude or chattel slavery.

Among the dark features of that instrument, we will instance the encouragement of the foreign slave-trade until 1808; also the slave population entering into the numerical basis of representation; and again, the guaranty to deliver up, on claim, all fugitives from slavery. It is to this latter feature of that instrument, justly esteemed glorious in other respects, in connection with the law of Congress, passed February 12th, 1793, for the purpose of fortifying and carrying out that guaranty—that we desire to direct attention. It is believed that no questions involving an inquiry into constitutional provisions and legislative enactments, have been so unsatisfactorily answered as the following which grow out of the cases arising under the Constitution and Act of Congress, and which are proposed as the topics of remark in this place.

First. What facts must exist to afford ground for delivering up, on claim, a fugitive slave. Second. How shall the proof of the facts be received. And thirdly. What is the extent of the jurisdiction of the officer, on the hearing of the claim?

In the discussion of these questions, it is no part of the design to challenge the Constitutionality of the Act of Congress, because it does not provide for the alleged fugitive slave, a trial by jury, and surround him with all the safeguards and appliances known to the

Reclamation of Fugitive Slaves.

common law; neither is it the design to offer reasons for or against the constitutionality of the laws of the several states, touching the claims and obligations of the alleged master and slave. But as there is no doubt that the case, (*Prigg v. The Commonwealth of Pennsylvania*, 16 Peters' Rep. 539,) will, to a great extent, if not fully in all cases, establish a precedent which the courts will obey—it is our purpose to inquire into the extent of the powers and duties contemplated in the Act of 1793, upon which that case mainly depends.

We place before us the second section of Article 4 of the Constitution: "No person held to service, or labor, in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service, or labor, but shall be delivered up, on claim of the party to whom such service or labor may be due." Also, the third section of the Act of Congress of Feb. 12, 1793: "When a person held to labor in any of the United States, or in either of the Territories on the north-west or south of the river Ohio, under the laws thereof, shall escape into any other of the said states, or territory, the person to whom such labor, or service, may be due, his agent, or attorney, is hereby empowered to seize and arrest such fugitive from labor, and to take him or her before any judge of the Circuit or District Courts of the United States, residing, or being within the state, or before any magistrate of a county, city, or town incorporate, wherein such seizure or arrest shall be made, and upon proof to the satisfaction of said judge, or magistrate, either by oral testimony, or affidavit, taken before and certified by a magistrate of any such state or territory, that the person so seized, or arrested, doth under the laws of the state or territory from which he or she fled, owe service or labor to the person so claiming her, it shall be the duty of such judge, or magistrate, to give a certificate thereof, to such claimant, his agent, or attorney, which shall be sufficient warrant for removing the said fugitive from labor to the state or territory from which he or she fled."

The Constitution, in the article aforesaid, has provisions as well for the reclamation of fugitives from justice as from labor; those provisions are naked grants of power, uncoupled with any prescribed methods of procedure under the various circumstances attending each particular case of escape. Without any legislation on the subject, it would have been exceedingly difficult to act under those grants, considering the diversity of the laws and constitutions of the states into which the fugitives might make their way. We have given the section relating to slaves, the better to observe its baldness, and to demonstrate the need of the Act of Congress of 1793. Now it is clear that if the pursuer of an escaping slave were left to the vague generalities of the language of this article of the Constitution, he might be justified, perhaps, in the extravagances which sometimes characterize the exercise of his power in the pursuit. But he is not left to any uncertain method of exercising his claim under the grant in the constitution. The Act of Congress aforesaid, comes in to his aid and shows him a pathway of pursuit and action, which if regarded by him insures him of certainty in his object.

Reclamation of Fugitive Slaves.

It will be seen on a comparison of the two sections in the constitution, the one relating to fugitives from justice, and the other to fugitives from service, that there is a strong resemblance in their provisions, as well as the circumstances that usually attend the fugitives. *Prima facie*, they are, each and both of them, entitled to pass on in the pursuit of happiness; the one is presumed to be innocent; the other free. And this presumption of the law in their behalf, attaches to them through all their perambulations, till it is removed by a charge of crime in the one case, and a claim of service in the other. Congress has legislated on the modes in which the charge against the alleged criminal shall be presented and what power shall be exercised in preferring it; as well as the claim against the alleged slave for service, and what step shall be taken in the exercise of that claim. And this legislation is conclusive on all the parties and paramount in its influence and power. No one will question the absolutism of its acts under the constitution, when in conformity with that constitution and carrying out its behests. We will not stop here to inquire into the constitutionality of the Act of 1793, as it will not aid us in this behalf, since the proper tribunal has never declared its dissent to its provisions. The guidance of this Act must, therefore govern us in our onward examination of the question.

Pursuing the order of inquiry marked out above, and having reference to the extracts before us, it will be seen that in order to found a claim to the delivery of a fugitive slave, the claimant must establish **THREE THINGS** before he becomes entitled to his slave—and in a particular manner, viz: 1. A holding to service or labor; or in other words ownership of the alleged slave according to the law of the slave state. 2. Escape from the state in which he is held to service or labor, into some other state. 3. Identity of the person held to service and escaped, with the person claimed and alleged to have been held to service and fled. Such are the substance, the basis, the essentials of all such claims; and unless established in the manner prescribed by the law of congress quoted above, the claimant can take nothing; he must fail of his certificate from the judge, if he obey the law and regard his oath of office. That the facts of ownership and escape, both by the Constitution and the Act of 1793, are made a *sine qua non*, is too apparent to require argument.

The next inquiry is, how shall the proof of the facts be received? This is an important question, but just as easily settled as the other; and by the statute itself, if it be allowed to answer in its own plain and unequivocal language. Claimants blinded by interest, and judicial officers regardless of human rights, because of the abjectness of the individual in whom they exist, may not discern the meaning, but the careful and upright judge cannot err, nor mistake in the construction. The Act of Congress is explicit in directing the claimant before leaving home in his pursuit of the fugitive, to take the testimony of the facts of ownership and escape, either in the form of affidavits, or orally, reducing the words to writing before the proper federal judge or magistrate in his own state, and have the same duly certified

Reclamation of Fugitive Slaves.

by said judge. The proofs of ownership and the escape being completed by the magistrate, the same are certified by him to have been taken pursuant to the statute.

These proofs being in his pocket, or in that of his attorney or agent, they will authorize the arrest of the fugitive, and for ever protect the act of arrest from the charge of kidnapping—these certified affidavits, or oral evidences of the tenure and escape of the slave, are a species of process of law, a *quasi* warrant, by which the fugitive may be taken, *quicumque et quocumque*; nevertheless they are useful at this juncture of the pursuit, only as a protection to the owner as trespasser; thus covered with the ægis of the law, the claimant sallies forth in quest of his runaway; he arrests him by the strength of his own right arm, or that of his faithful agent or attorney, and takes him before any United States District or Circuit Judge, or any magistrate of any county, city, or town where he was seized; and where there is no state law to bar a state officer from hearing the claim, as in New-York, we will suppose the prisoner taken before a justice of the peace; this officer perhaps for the first time in his life, reads the law which gives him jurisdiction in a matter of such moment as the personal liberty of a man, guilty of no crime, nor charged with any; the proofs taken before the magistrate with his certificate, are produced in evidence to support the claim; the alleged fugitive is himself in court; the justice has now full jurisdiction both of the subject matter of the claim, and the person claimed—the one by reason of the proofs and certificate, the other by reason of the presence of the prisoner; from an examination of the proofs, the justice is satisfied that the person named therein “doth, under the laws of the state or territory from which he fled, (the proofs show the escape as well as the tenure,) owe service or labor to the person claiming him;” but one thing more remains to be done before the certificate is signed; no evidence of identity between the person named in the proofs and the prisoner has yet been offered; identity is the only thing to be proved by *viva voce* testimony, in a hearing touching the right or claim of the owner; a witness is sworn as to that circumstance, and their identity is shown; the certificate is granted and here ends the jurisdiction of the justice. The certificate for removal would not be a valid instrument, and any act under the same would be a trespass, if it were given without the examination of the proofs taken abroad, and without the presence of the fugitive—the examination of the proofs and presence of the slave being necessary to give the judge jurisdiction over the subject matter, and the person against whom the claim is made. It seems that having thus acquired jurisdiction, his task is, only, to be satisfied of the ownership, escape and identity; the two former are certified to him; the latter he ascertains by swearing a witness who knows the person.

It would seem that a judicial officer, whether state or federal, in such a case as supposed above, is not authorized to travel out of the record, but must dispose of the case upon the testimony certified to him by the magistrate from abroad, except in the single matter of identity; the language of the statute is express upon that point; and

Reclamation of Fugitive Slaves.

there are good reasons for such limitation—shall the two great grounds of claim guarantied in the constitution, to wit: the tenure and the escape be determined, on evidence as uncertain and interested as is usually at hand on the examination of such a claim? The title deeds are the highest evidence of tenure, and the statute designs that the best evidence shall be furnished, and that the vague and uncertain knowledge of a witness who may be present at the hearing, shall not be received on so grave a point as the title of one man to another. In the supposed case above, the officer is imagined to be satisfied with the proof, &c., and to give his certificate. But there are difficulties in many cases not easily obviated; in case the hearing of the claim should not be before a federal judge, who may be bound to know the laws and decisions of courts in other states, but before a state judge or magistrate, it would seem that the claimant before going abroad in pursuit of his slave, should take with him duly authenticated copies of the laws under which the slave is held to service; for as the officer is to be judge of both the law and the fact, how can he decide that certain proofs make out the case, or have application in the premises, unless he know the law to which the proofs relate?

Every officer to whom the statute gives jurisdiction, cannot claim to be so learned in the laws of other states, as to find no difficulty in this behalf. It will be well, therefore, for the claimant not only to come prepared with proofs certified, but with laws exemplified. The whole subject of title to the alleged slave is in controversy; as the law is, it raises in behalf of the alleged fugitive, the plea of the general issue; not a holding merely, but a holding according to law—it will not tolerate a kidnapper's claim, and hence challenges scrutiny; it presumes all and singular in favor of the prisoner; his being in another state from that in which he lately resided, is not to be received as evidence of escape—it must be proved as fully as title; and it leaves the claimant to make out his title. If he is successful in showing that he holds him under the law, and that he has escaped, however hard the destiny that the law has decreed him, it must be executed while remaining in force.

Again, this being "held to service or labor under the laws," presents a mixed question of law and fact, not always easy of settlement by a Federal Judge, to say nothing of inferior magistrates; it involves an infinite variety of relations and distinctions which perplex the law of wills, descent, &c. But the claimant is provided with a forum in which to settle all such controversies; and if with full and perfect means in his power while at home, within his own state, where the proofs are at hand, he neglect to make out his case at the hearing or examination before the judge or magistrate, he is inexcusable in the seizure, and should meet with no favor.

The above construction and view of the act of congress of Feb. 12, 1793, are supported by the analogous proceedings and practice in relation to fugitives from justice. Having escaped into other states, they can be reached only by due proof of an offence charged against them in their own state. This proof is duly certified, in shape of an

Reclamation of Fugitive Slaves.

indictment, or affidavits, to the executive of the state where the offender has fled; if he is satisfied that an offence has been committed, and that the person properly charged with the offence is in his state, it is within the compass of his duties to grant an order for the removal of the person so charged to the state from whence he fled; he takes no proofs, he entertains no hearing; his acts are summary, and founded on the proofs taken abroad. The only differences distinguishable in the case of the slave and that of the criminal, seem to be that in the one case the law requires the presence of the person before the judge, to determine his identity; in the other case the identity is to be determined by the officer who is charged with the order of the executive. In the one case an arrest is made before the order for removal, in the other case it is made after. But in both cases the removal cannot be till after the order or certificate is granted.

The question will arise, what will become of the slave, or the criminal, *ad interim*, if the owner in the one case, and the officer in charge in the other, shall be overtaken and called upon to make answer to *habeas corpus*, or other writ, in the premises? The answer is, obviously, that if it shall appear at the hearing, that the custody of the person is according to the provisions of the act of congress, in some, or all of their stages of action, he will not be discharged.

The last subject of inquiry proposed is: What is the extent of the jurisdiction of the judge or magistrate? As the powers and duties of such officer are creatures of the statute; as the subject in controversy before the officer, to wit, the enslaving of an individual, is contrary to natural right; as all the common law appliances and defences are withheld from the alleged fugitive, on the hearing and examination; as the proceeding is summary, and so intended to be, in the nature of the case, (as is seen in requiring the claimant to come prepared with his proofs all certified and sure); as neither subpoena to compel attendance of witnesses, nor bail to save one from confinement, is provided for in the act, the conclusion is irresistible, that the jurisdiction of the officer is limited to what is expressly written; he cannot delay the proceedings by adjournments on the motion of the claimant, nor make order for the commitment of the alleged fugitive to enable the claimant to send for proofs other than those touching the identity of the person; in fine, the law of the United States intends readiness of action on the part of the claimant; summariness of proceeding on the part of the magistrate; and immediate liberation for the person seized, if the certified proofs from abroad, are not "to the satisfaction of such judge or magistrate, that the person so seized, or arrested, doth, under the law of the state or territory from which he fled, owe service or labor to the person claiming him." For any detention by the magistrate, beyond a time sufficient to examine the proofs sent him, the law of the state from which there has been an alleged escape, and the identity of the person, except on the motion of the prisoner, no doubt an action for false imprisonment will lie; besides, such detention will present a proper case for the writ of *habeas corpus*, to discharge the person seized.

Reclamation of Fugitive Slaves.

No doubt the same rules of evidence should govern where the claimant is called upon to show cause why he holds to service, by the mandate of a judicial officer, as those that should govern in a case where the claimant, in obedience to the law of the land, makes his claim, and asks for the deliverance of the person claimed. In either case, the same end is in view ; to wit: the possession of the slave ; and it seems no valid reasons can exist for a different rule. Besides, as the claim is against the natural rights of the person, whether such claim emanate from the alleged owner, in the way of a pursuer, or of a defendant, it is no more than reasonable and right that the claimant should be held to the strictest rule ; in short, to the rule in such case made, if it can be discovered whether there be a rule given in the case of such claim. If none have been given, then it is well to follow the best light we have on the subject of evidence ; and, if the claimant shall make capital by means of any allowance or departure, in that particular, it may be set down to his good fortune. But we aver that congress has given the rule on the subject of claim in every case contemplated by the constitution ; and we quote the language of Judge Story, in the case of "*Prigg v. The Commonwealth of Pennsylvania*," 16 Peters, in support of the averment. "It (the act of February 12, 1793,) points out fully all the modes of attaining those objects, which congress, in their discretion, have as yet deemed expedient or proper to meet the exigencies of the constitution." This case concededly inhibits the states from all legislative interference with the "mode" of procedure prescribed by the said act, in the attainment of the claimant's rights, and leaves that act to regulate the whole subject matter ; as well the steps, doings, duties and decrees of the judicial officer, as the *modus operandi* of the arrest or seizure of the fugitive by the claimant.

As well may a judge depart from any other explicit and clear requirement of the act aforesaid, as in that of the manner and kind of evidence that congress has said shall be the proper proof of the claim ; and if he may allow any other proofs than those named in the act, he may allow any other mode of procedure than that named in the act ; and instead of determining the facts of title, escape and identity, himself, as demanded by the act, he may submit those questions to a jury. But it is sufficiently manifest that he cannot enlarge the method of procedure marked out for him by Congress, whose proper province it was to direct his steps. The language used by that body cannot be mistaken : If the law gives Shylock, in search of slaves, his pound of flesh, let him be carefully watched, so that in taking away the quivering modicum of muscle, he draw no blood, on penalty of the law.

Such, it is conceived, ought always to be the rule, on claim, by the owner, whether showing his claim offensively or defensively.

We have seen above that the law of Congress has flung a shield around the alleged fugitive—that it also shields the claimant in his search for his slave, and if he have taken the proper initiatory steps, guards him from the charge of kidnapping, and enables him to take away his slave peaceably. We may add that no man ought to be

Reclamation of Fugitive Slaves.

held responsible in the sum of \$500, as provided in the last section of the act aforesaid, for obstructing the claimant in the reclamation of his slave, unless he produce from his pocket the proofs taken by him at home and duly certified according to the third section of the act; that *quasi* warrant; that proper evidence of his mission abroad in quest of the fugitive. Nor is it easy to see how an illegal pursuit of the slave can give a legal claim to the pursuer, against any one who may chance to be in his way, without knowing he is authorized by the law of the land to exercise any peculiar privilege.

From the foregoing considerations, we deduce the following propositions:

1. The Act of Congress, of Feb. 12th, 1793, contemplates that the claimant, before going in pursuit of the fugitive, shall, while at home in the slave state, take his proofs, either by oral testimony or affidavit, before some magistrate in the slave state, establishing the fact that a person held to labor by such claimant, and owing service to him, under the laws of that state, has escaped into some other state.

2. The proof taken must be certified by such magistrate.

3. The proofs and certificate, are a *quasi* warrant for the arrest of the fugitive, by the claimant, his agent, or attorney—and would be good evidence in favor of the person seizing such alleged fugitive, if charged with kidnapping.

4. Three things are necessary to give the judge or magistrate before whom the prisoner is brought, jurisdiction of the whole matter; viz: 1. The proofs of holding to labor and escape therefrom, taken before the magistrate in the slave state. 2. The certificate of said magistrate. 3. The presence of the alleged fugitive.

5. The statute of 1793, having provided what proof and how they shall come before the judge or magistrate before whom the prisoner is brought, there is no room left for any other testimony to be received or taken by said judge or magistrate, except such as relates to the identity of the person under arrest with the person described in the proofs from abroad—witnesses can testify only as to the matter of identity.

Thus it is seen that the law of congress has flung around the alleged fugitive many safeguards, and put the claimant to the strictest proof of his rights under the laws of the state where slavery exists by force of state sovereignty and state rights never yielded up on entering into the GREAT CONFEDERACY; and while so confederated and bound together by written stipulations, good faith requires obedience to all the articles of the compact—the question of the cancellation of the contract, and of the repeal of the law enforcing it, present other and graver considerations.

H. D.

PRACTICAL POINTS, &c.

CRIMINAL LAW.

FINDING A CHATTEL.

If a person drop any chattel, and another find it, and take it away, with the intention of appropriating it to his own use, and only restore it because a reward is offered, he is guilty of larceny. The only cases in which a party finding a chattel of another can be justified in appropriating it to his own use is, where it may be fairly said that the owner has abandoned it. *Reg. v. Peters*, 1 C. & K. 245.

BILL OF EXCHANGE—ACCEPTANCE BY MARRIED WOMAN FOR HUSBAND IN HER OWN NAME.

THE question in this case was, whether a husband could give his wife authority to accept a bill of exchange for him in her own name. On the trial it appeared by the evidence, that the bill of exchange in question was directed to the defendant and accepted by the wife in her own name, and there was proof, and the jury found the fact, that the defendant had recognised his wife's authority to accept the bill.

It was contended for the defendant, that an action would not lie upon a bill against an unnamed principal, and that to bind the defendant the acceptance must be in his own name or in one intended to represent his name. On the other hand, the case of *Coty v. Davis*, 1 Camp. 485, recognised in *Prestwick v. Marshall*, 7 Bing. 565, as also in *Prince v. Brunette*, 1 Bing. N. C. 485, was a clear authority to show that a good title to a promissory note of which a married woman was payee, might pass by her endorsement in her own name, where there was proof of an authority from the husband to her for that endorsement.

The court of common pleas held that *Cotes v. Davis* was in point, in the present case, and that the defendant was liable. It was observed, that the drawee of a bill might bind himself by accepting in a name other than his own, and that (assuming the authority of the wife) the defendant had by her hand written her name upon the bill. It was the same as if he had written this by his own hand, in which case his liability would hardly be contested. It made no difference that instead of using his own name, he, the acceptor, was by his authority styled in the name of his wife. *Lyndus v. Bramwell*, 17 Law. J. 121.

N. Y. Supreme Court.—Hall v. Parker.

We direct the attention of our readers to the very able leading article of this number, from the pen of Horace Dresser, Esquire, of the New-York Bar.

N. Y. Supreme Court.

[*Albany Circuit.*]

HALL V. PARKER.—6 Dec., 1848.

PERCENTAGE UNDER § 263 OF THE CODE—IN WHAT CASES ALLOWANCES APPLICABLE.

It is only in difficult or extraordinary cases that the court is authorized by § 263 of the Code to make an allowance of the percentage in addition to costs. Where, therefore, a defendant put in his answer but omitted to file an affidavit of merits: Held, that the case was not of the character contemplated by the Code.

The percentage is designed to compensate for great labor and extraordinary services, and the discretion given is confined to causes of that description.

ACTION upon promises, the defendant put in an answer, but did not file an affidavit of merits.

O. Allen, asked for an allowance of the percentage, under the 263 section of the Code.

By the Court—PARKER, J.—It is only “in difficult or extraordinary cases,” that the court is authorized, by § 263 of the Code of Procedure, to make an allowance of the percentage, in addition to the costs, provided by § 263; and it is certainly neither a difficult nor an extraordinary matter, for a defendant to put in an answer, and afterwards make default at the circuit.

It would be, perhaps, in many cases, a just punishment upon the defendant, to impose such additional costs, for having put in a false answer for the purpose of delay; but that is a question for the legislature, and not for the courts. As the law now stands, I think it is not applicable to such a case. The percentage is designed to compensate for great labor and extraordinary services, and the discretion given is confined expressly to causes of that description.

I regret that any such power has been conferred on the courts. There will be great difference of opinion among the judges as to whether a case is difficult or extraordinary, and no uniformity of practice. I think it would have been much better to have had the rule, as to costs, fixed and certain. But we must take the law as we find it, and although it may be very difficult to decide to what cases the allowance is applicable, I think it is quite clear that this case is not of that character.

N. Y. Supreme Court.—Hamilton and Deansville Plank Road Co. v. Rice.

[Madison Circuit.]

HAMILTON AND DEANSVILLE PLANK ROAD CO. v. RICE.

ASSIGNOR OF CHOSE IN ACTION A COMPETENT WITNESS, THOUGH
ASSIGNMENT MADE TO MAKE HIM A WITNESS.

An assignor of a thing in action is a competent witness, though it appear that the assignment was made for the purpose of making him a witness.

THE question adjudicated upon, sufficiently appears in the opinion of the learned judge.

Nye, for plaintiff.

Eldridge, for defendant.

GRIDLEY, J.—The objection is made upon the ground that the witness is an *assignor of a thing in action, assigned for the purpose of making him a witness*, and not on the ground that the witness is still interested in the event of the suit. I think that a careful reading of the 351st and 352d sections of the Code will show the objections to be untenable. The 352d section does not declare that the assignor of a thing in action, assigned for the purpose of making him a witness, shall be *incompetent* as a witness, but that the 351st section shall not apply to such assignor. Now, the 351st section simply enacts, that no person shall be excluded from being a witness by *reason of his interest in the event of the action*. The conclusion is, therefore, that if the assignor who has assigned to become a witness, still remains interested in the event of the suit, he shall continue to be incompetent, notwithstanding the provisions of the 351st section. If that section should be applied to such an assignor, he might be a witness though he *remained interested* in the event of the suit, as in many cases he does, notwithstanding the assignment. The Code intended to exclude such assignors, if *interested*, though *interest*, as a general rule, would not render a witness incompetent.

Such an assignor, if divested of his legal interest, would have been competent under the old law, and it is the policy of the Code to *enlarge and not contract* the rule of competency as applied to witnesses. The witness is competent.

N. Y. Court of Common Pleas.

Before the Honorable M. ULSHOEFFER, First Judge, and Assistant Judges INGRAHAM and DALY.

SHABURY BREWSTER v. GARRIT H. STRIKER. SAME v. GARRIT H. STRIKER, DAVID THOMAS, DAVID MORRISON and GARRIT H. STRIKER, JUN.

EXECUTORY DEVICES—TRUST ESTATES—LEASING POWERS—ACTIVE TRUSTS—CESTUI QUE TRUSTS—EXECUTORS—TRUSTEES—ALIENATION—EJECTMENT—TITLE BY POSSESSION—PRESUMPTIONS—ESTOPPEL—PARTITION—RELEASE.

Where a testator by a will made in 1815, devised his real estate to his three grandchildren, directing that it should not be sold or alienated, but that his executors should from time to time lease or rent it, on such terms and for such rent as they might deem most advantageous to his heirs, keep certain portions of it in repair, and pay the rents and profits annually to the heirs, in equal proportion, held an *active trust*, and that the executors took the legal estate during the lives of the grandchildren.

The duty imposed by such a will upon executors is not a mere leasing power. When something is to be done by them which makes it necessary that they should have the legal estate, such as the payment of rents and profits over to another's separate use, or any power of management, they take the legal estate.

The absence of express words of devise is not material. If it be necessary that the trustees should have the legal estate they take it by implication of law.

A release or conveyance from trustees to a *cestui que trust* will not be presumed, though the *cestui que trust* has been in possession, and the trustees have ceased to act for many years. It will not be presumed that an act was done which would be a breach of the trust, or be contrary to the duties of the trustees.

ULSHOEFFER, J.—*Contra*.

Artificial presumptions may be received when the fact to be presumed is consistent with the power conferred, as when an act has been directed to be done, and it is a necessary link in a chain of title.

Where trustees are authorized to lease to a *cestui que trust*, and he has been for many years in actual possession of a portion of the premises, it may warrant the presumption that he holds under a demise from them. But under our Revised Statutes, a tenancy from year to year, is all that will be presumed in such a case.

Possession creates the presumption of an estate in fee, and a plaintiff in ejectment, who claims under a sheriff's deed, is entitled to recover upon showing that the judgment debtor was in possession at the time of the sale of the premises upon the execution. But if, after showing such possession, he introduces additional evidence, by which it appears that the title is not in the debtor, but in another, he destroys the presumption created by the possession, and having shown the fee out of himself, cannot recover.

Priority of possession is sufficient to authorize a recovery in ejectment, where nothing but possession is shown by either party. But it will not be sufficient where the title and the right to the immediate possession is shown to be another, though not the defendant. (Note to *Cotterus v. Cowper*, 4 Taunt. 547, commented on and explained.)

A party who has united in an application for the partition of real estate, claiming to be seized in fee of a portion of the land which is accordingly allotted to him, is estopped thereafter from showing the fact to be otherwise.

THESE were actions of ejectment, brought to recover certain premises situate in the city and county of New-York, consisting of a farm at Bloomingdale and two houses and lots in said city, of which the defendant was alleged to be seized in fee. The plaintiff claimed as purchaser at a sheriff's sale, of all the interest which the defendant,

N. Y. Court of Common Pleas.—*Brewster v. Striker et al.*

Garrit H. Striker, had in the premises at the time of the recovery of the judgment under which the sheriff sold, to wit, on the 14th day of February, 1840. It was shown on the part of the plaintiff, that at the time of the recovery of the judgment, the defendant was in possession of the farm, and that previous thereto he had demised the houses and lots for a term of years to the defendants, Thomas and Morrison, who were then in possession as his lessees. It further appeared, that the premises in question originally belonged to John Hopper, who died on the 2d day of August, 1819, leaving a will by which he devised all his real estate to his three grandchildren, Ann Striker, Winifred Mott, wife of Jordan Mott, and Garrit H. Striker, the defendant, and in which he provided that the real estate so devised to his grandchildren should be disposed of as follows by his executors, that is to say, "*the said real estate shall not at any time hereafter be sold or alienated, but my executors, or the survivor of them, shall from time to time lease or rent the same, on such terms and for such rent as they may deem most advantageous to my said heirs, and the rents, issues and profits of the same shall be annually paid by my said executors and the survivor of them, or the executor or administrator of such survivor, to my said heirs in equal proportions; and if either of my said heirs, or their children, lawfully begotten, shall choose to occupy any part of my said real estate, he, she or they shall have a preference to any other applicant, on paying a reasonable rent for the same.*" "And in case any of my said heirs or devisees shall die without lawful issue, then and in such case my will is, that the share of the one so dying shall be and enure to the sole use, benefit and behoof of my said grandchildren, and the survivor of them, and the heirs of such survivor forever." The testator then further provides, that "*notwithstanding any devise or bequest hereinbefore contained, it is my will and desire that my wife shall, during her widowhood, occupy my present dwelling-house, with five acres of land adjoining the same,*" (part of the premises in question,) "*which, together with the fences, shall be kept in repair by my said executors, or the survivor of them, and shall also have firewood sufficient for her use, to be cut off my said farm; and further, that during her said widowhood she shall be annually paid, out of the proceeds of my real estate, one hundred pounds.*" The will of Hopper was admitted to probate, and the executors qualified and took upon themselves the execution of the will. The three grandchildren are still living; the defendant, Garrit H. Striker, and Winifred Mott, respectively, having lawful issue living, but Ann Striker being unmarried and without issue. On the 28th of November, 1820, Ann Striker applied by petition to this court for a partition of the said estate so devised, setting forth that she was owner in fee of an equal undivided third part of said estate, as tenant in common with the defendants, Garrit H. Striker and Winifred Mott, and that they were owners in fee, respectively, as tenants in common, each of one equal undivided third part thereof. The defendant, Garrit Striker, duly appeared and answered such application, and severally admit-

N. Y. Court of Common Pleas—*Brewster v. Striker et al.*

ted all the facts set forth therein, and consented to such partition. Upon which application commissioners were appointed who made partition in due form of the said estate, setting off and allotting to the defendant a portion of the premises to be held and enjoyed by him in severalty, in fee simple for his part and share thereof, which portion covers and includes the property in question in this suit, all of which was duly affirmed by this court, and a judgment for said partition rendered accordingly in March, 1821, and on the 8th of April following, Ann Striker and Winifred Mott released to Garrit H. Striker, all their interest in the portion allotted to him. From the decease of Hopper to the partition, Garrit H. Striker continued in possession of the farm with the assent and concurrence of the executors, and after the partition, he continued to occupy and still occupies the portion allotted to him. The executors let, repaired, and paid taxes upon the two houses and lots in the city of New-York, parcel of the premises claimed up to the year 1826. All of said executors are now dead. On the 14th of February, 1840, a judgment was recovered against Garrit H. Striker in the Superior Court of the city of New-York, under which judgment his right, title and interest in the premises in question was sold by the sheriff and purchased by the plaintiff to whom the sheriff executed a deed of conveyance on the 21st of February, 1844. The cause came on to be tried before *Daly, J.*, and the plaintiff having rested upon this state of facts, the defendant's counsel moved for a non-suit on the following grounds:

1st. That under the last will and testament of John Hopper, deceased, the executors of the will and the survivor of them, took an estate in the premises in question, in trust for the three grandchildren of John Hopper, named in the will, during the lives of the three grandchildren.

2d. That the interest taken by Garrit H. Striker, under the will, was an equitable and not a legal estate.

3d. That no estate in the premises passed by virtue of the sale made by the sheriff under the judgment and execution above set forth; nor was any title or right to the possession of the premises conveyed to or vested in the plaintiff by the deed executed by the sheriff as above set forth; and that under the will, sheriff's sale, partition and deed, the plaintiff was not entitled to recover.

4th. That the plaintiff had not proved nor given in evidence any such title to or right to the possession of the lands claimed in the declaration, so as to entitle him in law to recover.

The nonsuit having been granted, the counsel for the plaintiff now moved to set it aside and for a new trial. The application was made in banc before Judges *Ulshoeffer* and *Ingraham*.

Daniel Lord and *George Wood*, for plaintiff.

It was shown that Garrit H. Striker was in possession, which was sufficient to entitle the plaintiff to recover. He was in actual possession of the farm, and the defendant *Thomas D. Morrison* held

N. Y. Court of Common Pleas.—Brewster v. Striker et al.

under a demise from him and were estopped from denying that he had seisin and possession.

II. The executors under the will of Hopper took no legal estate in the premises. The will merely gave them a trust power which was inoperative and void as tending to a perpetuity, or a mere leasing power which did not carry with it the legal estate.

III. Under the will Garrit H. Striker took a fee tail in the premises demised which was converted by the act of 1786 into a fee simple absolute. The limitation over being upon an indefinite failure of issue. 2 Cow. 133; 11 Wend. 26 Wend. 119.

IV. Even if the power in trust was valid and the failure of issue is to be confined to the first taker, then, under the will of Hopper, the plaintiff took a direct devise of a fee in an undivided third, subject to a power in trust in the executors during the three lives to demise the lands, and to an executory devise over in case of his death without issue surviving. This was alienable and would pass by a sheriff's sale. 6 Hill, 601.

V. Supposing that by the will taking effect in 1819, the executors took the fee by implication to save supposed trusts of the will during the three lives such trusts were, prior to the Revised Statutes, subject to be extinguished by the demand of a conveyance by the *cestui que trust*. They were therefore by the Revised Statutes changed into legal estates in the *cest. qui trusts*. Here was nothing discretionary in the trustees. No such active management as the Revised Statutes contemplated in trusts continued.

VI. The trust would be illegal under the Revised Statutes, and so are to be deemed converted into legal estates.

VII. The possession of Garrit H. Striker, in the absence of all explanation to qualify that possession, is evidence of a *release* to him by the executors of the legal estate, and of his seisin in fee. This possession carries with it such a presumption, especially since the executors have ceased to act for so long a period, and the title being in him it passed by the sheriff's sale to the plaintiff.

Edward Sandford and Charles O'Connor, for defendants.

I. The plaintiff cannot recover without showing a present legal estate in Garrit H. Striker; a mere tenancy at will under the trustees, though saleable under an execution before the Revised Statutes, is no longer so.

II. The executors took a *legal estate* in the lands, at least during the lives of the grandchildren respectively. It is unnecessary to inquire whether their estate had any longer duration.

III. If the devise was intended to vest in the executors a *legal fee simple*, and in the children an equitable *fee tail*, for the purpose of restraining and preventing alienation, such devise would not be invalid as tending to a perpetuity.

IV. The true construction of the will is, that the trustees took a legal estate in each third during the life of each grandchild, with a contingent legal remainder in *fee simple* to the issue of each grand-

N. Y. Court of Common Pleas—*Brewster v. Striker et al.*

child; subject to an executory devise over, in the event of their being no issue living at the death of such grandchild.

V. The provisions of 1 R. S. 727, § 47, 48, did not convert the equitable estate of Garritt H. Striker into a legal estate.

VI. The decree in partition was void. The grandchildren had no present legal estate, and the trustees were not made parties.

Judge Ulshoeffer delivered a brief opinion in favor of setting aside the nonsuit, placing the plaintiff's right to recover upon the fact of the defendant, Striker's, possession, and adopting, in the main, the views of the plaintiff's counsel. Judge Ingraham remarked, that his views were adverse to the plaintiff; but that as he and Judge Ulshoeffer differed in opinion, it would be necessary to order a re-argument before the whole court. The case was accordingly re-argued at the next term by the same counsel, when the following opinions were delivered.

DALY, J.—To enable a plaintiff in ejectment to recover, he must have a valid and subsisting interest in the premises claimed. (2 *Rev. Stat.* 400, § 3, 3d edit.) And he is bound to specify in his declaration the nature of that interest; whether he claims in fee, for his own life, the life of another, or for a term of years, specifying such lives or the duration of such term. (2 *Rev. Stat.* 3d edit. 401, § 10.) The plaintiff claims the premises in fee, and he may recover if it appear that Striker had such an estate on the 14th day of February, 1840. If an estate in fee existed in Striker at that time, it was bound by the judgment and passed by the sale and the sheriff's deed to the plaintiff. (2 *Rev. Stat.* 454, § 6; 3 *Watts*, 223; 2 *Yeates*, 443; 3 *Cai.* 188; 3 *Wash. C. C. Rep.* 546; 1 *Marsh.* 68.)

Striker was in possession of the whole of the premises claimed at the time of the recovery of the judgment, for the leases to Heath and Morrison were made subsequently. This was *prima facie* evidence of an estate in fee. The possession of land raises the presumption of such an estate. (5 *Taunt.* 326; 7 *Wheaton*, 59; 2 *Black.* 196.) It was a presumption, moreover, which the defendants were estopped from disputing. Striker was estopped by his participation in and assent to the partition, from denying that he had an estate in fee in the portion allotted to him, and by his leasing to Heath and Morrison, from setting up that he had no estate in the portion demised to them, and they were estopped from disputing his title. (4 *M. & S.* 347; 1 *Bingh.* 147; 2 *Ad. & E.* 17.) If the plaintiff, therefore, had rested upon this state of facts, he would have been entitled to recover. But he did not rely upon Striker's possession. He introduced the will, and has shown by it, that as respects the premises in question, Striker is but a *cestui que trust*, and that the legal estate is in the executors of Hopper.

Under the will the executors took a trust estate by implication of law, which continued in the trustees, or the survivor of them, or the executors of the survivor, during the lives of the three grandchildren. They were authorized to make repairs and lease and rent the real

estate from time to time, on such terms as they should deem most advantageous to the heirs, and were to pay the rents, issues and profits to the heirs annually, in equal proportions. This was not a mere leasing power. Where something is to be done by the trustees which makes it necessary that they should have the legal estate, such as the payment of rents and profits to another's separate use, or any power of management, they take the legal estate. (*Bing. N. C. 573*; *6 Ad. & E. 206*; *2 Williams' Saunders, 11, Note.*) Such is the nature of the trust created by this will. The trustees are to keep part of the land in repair and pay the rents and profits over to the heirs. It is an *active trust*, which was valid before the Revised Statutes, and vested the legal estate in the executors. (*2 Paige, 387*; *3 East, 553*; *1 Eq. Cases Ab. 383*; *9 East, 1*; *2 Taunt. 109*; *4 Taunt. 772*; *3 Brown's Parl. Cases, 178 and 458*; *2 Term Rep. 444*; *1 Brown's Ch. Cases, 74*; *Ambler, 93*; *1 Jarman, Powell on Devises, 221, note 7.*) The absence of express words of devise in the will is not material, for if it be essential to the execution of the trust, that the trustees should have the legal estate, they take it by implication of law. (*6 Ad. & E. 206*; *2 Burr. 860*; *2 Jarman, Powell on Devises, 199.*) The plaintiff, therefore, by showing that the legal estate is in the executors, has destroyed the presumption of a seisin in fee, which the law implies from the fact of possession. (*9 Cow. 86.*) The defendants were estopped from showing it, but the plaintiff by introducing the evidence on his part has waived the estoppel. (*1 Salk. 276*; *1 Dev. 208*; *2 Duna, 251*; *A. K. Marsh. 145*; *9 Cow. 86.*)

It may be claimed that as against the defendants, Thomas and Morrison, the plaintiff is entitled to recover upon the ground of priority of possession; for it has been said that mere priority of possession, though all other title be expressly disproved, is sufficient in ejectment to enable the plaintiff to recover against every one but the party having the true title. (*Catterns v. Couper, 4 Taunt. 547, note*; *2 Saund. 111.*) The rule is stated a little too broadly by the Reporter in his note to this case in Taunton. Priority of possession is undoubtedly sufficient where nothing but possession is shown by either party, for the prior possession carries with it the presumption of a legal title. It is but a presumption, however, which may be repelled, and which the plaintiff in this case has repelled, by showing that the legal estate is in the executors. (*2 Roscoe on Real Actions, 488*; *2 Term Rep. 749.*)

There is no ground for presuming that the executors released to the heirs. Artificial presumptions are allowed in certain cases, where the fact to be presumed is consistent with the power conferred, as where an act is directed to be done, and such act is a necessary link in a chain of title. (*6 Bing. 179.*) In such a case a jury may presume as a matter of fact, that the act was done. (*2 Comp. and Jerv. 461.*) But where it would be repugnant to the power given, no such presumption can arise. The trustees had no authority under the will to release to the heirs. A release by them would be inconsistent with the nature of the trust created, and we cannot presume that an

act was done which would amount to a breach of the trust, or be contrary to the duty of the trustees. (*S East*, 267.) It might be presumed, consistently with the will, that the executors leased to Striker, but this would not avail the plaintiff, for in the absence of any evidence of the duration of the term demised, we could presume nothing more than a tenancy from year to year, (2 *Rev. Stat.* 3d edit. 29, § 1,) which ceased on the first of May following the sale of Striker's interest, and before the commencement of these suits. If any presumption can be drawn from Striker's possession, it is that he was a tenant at will, or at sufferance, having a mere chattel interest in the land, which was not liable to sale on execution. 2 *Rev. Stat.* 3d edit. § 5.)

The plaintiff having failed to show that he has an estate in fee, cannot maintain this action. Even if a plaintiff might recover a lesser estate than that declared for, he has not shown that he has any interest which could be the subject of a recovery in ejectment. It is provided by the statute, not only that the plaintiff shall specify in his declaration, the nature of the estate he claims, but that the verdict shall express what estate he is entitled to recover, whether in fee, for his own life or the life of another, stating such lives, or for a term of years specifying the duration of such term. (2 *Rev. Stat.* 3d edit., 403, § 31, 7, § 10.) Where the action is not brought for the recovery of dower, these are the estates which may be recovered, and no such interest appearing in the plaintiff the nonsuit should be affirmed.

The partition made between the parties, and the possession under it by Striker would give him no estate subject to execution, if the estate did not vest in him under the will before such partition was made; and I should rather adopt the conclusion that the legal estate was in the executors under the will, they having a right to rent or lease the premises, collect the rents and pay over the proceeds equally to the heirs.

How far the subsequent limitations of the estate may be void, or what estate the survivors would take on the death of either of the grandchildren is not material to the decision of this case; the questions now being solely as to the legal estate of the defendant Striker at the time of the purchase by the plaintiff.

INGRAHAM, J.—Upon the former argument I was of the opinion that the plaintiff was not entitled to recover, and my views have not since been changed. My conclusions are—

1. That the plaintiff can only recover on showing a title in himself without reference to the validity of the defendant's title.
2. That the plaintiff having proven the will of Hopper under which the property passed, is bound by the title which he thereby establishes, and if he shows that it is not in Garrit H. Striker, he shows no legal title to the premises in himself.
3. That by the will of Hopper, the legal estate during the lives of the grandchildren is in the trustees, and not in them, and that they cannot alienate the property during their lives.

4. That a conveyance in fee by the trustees is not to be presumed, because it is inconsistent with the trust—they having no authority to convey to the *cestui que trust* during the lives of the grandchildren.

5. That a lease cannot be presumed for a longer period than a year, unless such longer term is proven.

6. I have had more difficulty in the remaining point, viz: whether the plaintiff could recover by merely proving Striker to be in possession. If there was no other evidence in the cause, I think the plaintiff would be entitled to recover on such proof, because title by possession is *prima facie* evidence of a fee—(9 *Wend.* 223.) And if the plaintiff had rested on mere proof of possession and of the leasing and proceedings in partition, the defendant would have been estopped from denying that he had title. But if the plaintiff goes further, and shows title in another, inconsistent with the title of the person in possession; the case then is entirely changed. The question then is not, whether this is such an outstanding title as the defendant could set up for himself, but whether the plaintiff has not shown the fee out of himself, (9 *Cow.* 86.) If he has, then, although the defendant may be in possession as a tenant at will or by sufferance, or without title, or as in this case, being the *cestui que trust* while the legal estate is in another, the plaintiff has shown that there is no estate owned by the defendant which he has a right to, or which he can claim. Although upon this point I feel some hesitation, yet my conclusion is that the plaintiff having shown a legal estate to the premises to be in the trustees, he is not entitled to recover against the *cestui que trust* although in possession.

ULSHOEFFER, 1st Judge, *dissenting*.—This is an action of ejectment tried on the 16th September, 1845, and a verdict taken, subject to the opinion of the court. The case has been twice argued before this court.

The plaintiff claims as a purchaser at sheriff's sale, on the 16th November, 1842, of the interest which Striker, Senior, had in the premises claimed, on the 14th February, 1840. Morrison is acquitted, and Thomas holds under Morrison, who had a lease for five years, from 1st May, 1841; Striker, Senior, being the lessor.

I. It appears to me that Thomas, the tenant in possession, cannot deny the right or title of the lessor for five years, or a title by possession. This is not selling merely the interest of a tenant at will, or sufferance, but the legal estate of one who by his acts is at all events to be deemed the lessor, having a legal interest commensurate with the lease granted by him. If the judgment did not bind, or was not a lien upon a leasehold interest of a lessor, from the time of docketing, the lessor's interest could nevertheless be sold, as it was, under the execution on 16th November, 1842. The lessor's title for five years is at least presumptive upon him and his tenants, and it could be sold under execution. This is not selling the lessee's interest, but the right of the lessor, which right or title is presumptively, if not conclusively established for the time embraced in the lease. The tenant held under this lease, which had not expired when this action was tried,

N. Y. Common Pleas.—Brewster v. Striker et al.

actual possession is *prima facie* evidence of legal title. The plaintiff comes into exactly such a possession as the debtor had. (2 *Black. Com.* 196: 4 *Cow.* 602: 5 *Wend.* 248.)

II. The fact also appears that the title of Striker, Senior, rests upon Hopper's will of September, 1815, under which the trustees could have held possession and paid over to Striker only his share of the rents. But the trustees are all dead, and since 1826 Striker has been in possession. The presumption then arises from the lease and possession by Striker, that the trustees have re-leased, and that Striker had the title in fee, which could be sold by the sheriff. This cannot be regarded as the sale of a mere equitable interest, or the interest of a tenant at will, or by sufferance, which are not liable as such to sale on execution. (1 R. S. 722, § 5.) This is the sale of the presumptive legal estate or title in fee. (9 *Cow.* 81-85; 10 *Johns.* 223.)

III. Legal presumptions may be rebutted, but the defendants have not afforded sufficient proof. The will alone is not conclusive. It is not shown by the acts of the parties that Striker only held a lease, or possession, under the trustees at will or by sufferance. It is not shown that the trustees acted since 1826, and received the rents and paid them over to the devisees in execution of the will.

It is not shown that the trustees in fact did not release to Striker.

It is not shown that Striker's lease to Morrison was ever surrendered by the latter, or that Striker, Morrison or Thomas ever attorned as tenants to the trustees. On the contrary, the acts and possession of Striker, and the silence of the trustees during their lives, indicate that the latter had relinquished and released to the former; we cannot presume a possession by Striker under the trustees, when the acts of the parties do not countenance such presumption.

IV. A plaintiff in ejectment must recover on the strength of his own title, but this does not preclude him from recovering on a presumptive title in fee, nor from holding a party concluded by his own acts from denying that he had an estate in fee or for years; and a tenant under such party is also bound by his landlord's acts.

V. No trustee under the will of John Hopper has been made a defendant in this suit; if any person now exists who could as trustee, or successor to a trustee under the will, make a valid claim to the estate. Whatever might be the true construction of the will as to the legal estate having been in the trustees, or devisees, we cannot disregard the presumptions arising from the silence of the trustees, and now hold, without their claim or any intervention by them in this suit, that the successors, or executors of the trustees hold the legal estate. When such executors of any trustees who acted and were duly appointed by the trustees according to the will, bring their action or come in and support their claim, it will then be proper to decide upon their rights. It does not appear that the trustees ever acted since 1826, or at their decease according to the will appointed successors to execute Hopper's will. We have no evidence that any person but the plaintiff has a right or disposition to claim the interest of Striker, except Striker himself, and his tenant, and their pretensions by way of defence are I think unfounded and unsupported.

VI. Mr. Striker, Junior, has shown no right available in any way in this suit.

VII. The Chancellor (in 2 *Paige*, 388) has not considered or decided the points arising in this suit. And if his views of the construction of the will are correct, it does not follow that the trustees could not release to the devisees; nor that the plaintiff in this suit could not under the circumstances recover as against Striker, Senior, or those holding under him.

VIII. The other ejectment suit of the same plaintiff against Mr. Striker, Senior, differs in some of the facts; Mr. Striker is alone the defendant, and he and the other devisees under the will of Hopper partitioned the premises in 1821, and executed releases. The premises in dispute in that suit are part of the portion assigned to Striker, which he has been in possession of ever since. The presumptions of his title in fee, and of a release by the trustees, are stronger in that case, and are not rebutted. The partition is not binding upon the trustees, who were not made parties, but it does bind the parties, and their long possession since leads to the presumption that the trustees acquiesced and released.

IX. My first impressions were clear, that the will vesting the estate in the devisees was not controlled by its other provisions, giving powers to the trustees, but since the re-argument I am less confident in that opinion. If, however, we concede that the trustees were by necessary implication to be regarded as originally having the right under the will to hold the legal estate in active trust, for the benefit of the devisees, I still retain the opinion that the plaintiff is entitled to recover in these suits upon the grounds above stated.

X. A plaintiff in ejectment claiming the premises in fee is entitled to recover though he only shows title by possession, (9 *Wend.* 223; 12 *Wend.* 171.) It is clearly an amendable error. (17 *Wend.* 80, 81; 20 *Wend.* 635.)*

[*March Special Term, 1849.*]

Before the Honorable D. P. INGRAHAM.

JOSEPH HOXIE *against* EDWARD F. CUSHMAN *and* CHARLES ROSS.

If a complainant does not show a cause of action it is demurrable; but it does not aid a defective answer.

Where, therefore, the complainant did not aver that the plaintiff was the owner of the promissory note on which the action was brought and the defendant answered, but did not deny the plaintiff's title thereto:—*Held*, that the answer was bad.

On the trial possession of a note would be presumptive evidence of title, and if a defendant deny it, he must either demur or set up such fact affirmatively in his answer.

It is not necessary in a complaint on a promissory note to state a consideration, especially where it appears that the payee has endorsed it, and put it in circulation.

Plaintiff having been allowed to amend his complaint, leave was given for defendant to withdraw his answer and serve a new one, on terms.

* This case was carried to the Court of Appeals and the judgment of the court below was affirmed.

Court of Common Pleas.—Vanderpool v. Tarbox and Kingsley.

THE complaint was on a promissory note and averred merely that the note was made by the defendant Cushman, and endorsed by the defendant Ross, was presented for payment, was protested, and that notice of protest was given to the endorsee and demanded judgment.

A copy of the note was annexed to the complaint.

The defendant Cushman answered and admitted all the facts alleged in the complaint; but denied that by *reason thereof* the plaintiff was entitled to judgment.

The defendant Ross demurred to the complaint, and at the February special term judgment was rendered for plaintiff on the demurrer, but it was reversed on appeal at the general term.

A motion was now made by plaintiff's counsel to strike out the answer of the defendant Cushman as frivolous, and for judgment against him.

Stevens and *Hoxie*, for plaintiff.

D. H. Stowe, for defendant.

INGRAHAM, J.—If the complaint does not show a cause of action; that should form the ground of demurrer, but does not aid a defective answer. We do not think it necessary in a complaint to state a consideration for a promissory note, especially when the payee has endorsed and put it in circulation. That the complaint is defective in not averring the plaintiff to be the owner of the note is conceded, but there is nothing in the answer denying his title, and on the trial possession of the note would be presumptive evidence of such title. If the defendant denies it, he must either demur or set up the fact affirmatively in his answer. There is nothing in this answer showing the plaintiff has not a right of recovery or denying any allegation made by the plaintiff. It is therefore bad; but as the plaintiff has been allowed to amend his complaint without costs, the defendant may withdraw his answer and serve a new one on the same terms.

JACOB VANDERPOOL, Junior, *against* DANIEL TARBOX and ELISHA KINGSLEY.

DEMURRER—PLEADING—ENDORSEMENT OF PROMISSORY NOTE—COSTS.

The plaintiff must state in his complaint facts necessary to prove at the trial to show a cause of action.

Where, therefore, in an action by the endorsees of a promissory note against the maker, the complaint merely alleged that the defendant was the *lawful* holder of the promissory note, but omitted to state that the note was *endorsed by the payee to them*:—Held, on demurrer, to be defective. Plaintiff permitted to amend without costs.

Costs are only allowed when there is a defect in substance in pleading; but where, as in the present case, the defect is purely of a technical character, amendments are permitted to be made without imposing costs as a condition of amendment.

N. Y. Court of Common Pleas.—*Vanderpool v. Tarbox and Kingsley.*

THIS was an action by the endorsee against the maker of a promissory note. The complainant alleged that the defendants, on the 12th day of September, 1848, made their promissory note in writing according, &c., whereby six months after said date they promised to pay to William Sharp, or to his order, the sum of \$450, value received: that the plaintiff *is the lawful holder* of the said promissory note, &c.

The defendant Elisha Kingsley demurred to the complaint, assigning the following grounds of demurrer.

Because it appears on the face of the complaint that this action is brought to recover the amount of a promissory note drawn by the defendants and payable to a certain William Sharp, or to his order, but it does not appear by the said complaint that the said note was ever endorsed over by the said William Sharp to the plaintiff or to any other person, not that the same has nor been paid to the said William Sharp or to his order, nor that payment thereof has ever been demanded or refused, nor that the said note is yet due and payable, nor that the plaintiff is the lawful owner and holder of the said note.

Because it does not appear by the said complaint that the said plaintiff has legal capacity to sue on the said note.

Because the said complaint does not state facts sufficient to constitute a cause of action.

Holden and Thayer, in support of demurrer.

W. Mulock, contra.

INGRAHAM, J.—The only ground of objection to the complaint in this case, which comes within the provisions of the Code is that the complaint does not show a transfer of the note to the plaintiff, and therefore does not state facts sufficient to constitute a cause of action. The plaintiff has omitted to state that the note was endorsed by the payee to him, but has made the allegation that he is the lawful holder of the note. I still think as in the case before decided, that the intent of the Code was that the plaintiff should state in the complaint the facts which he must prove on the trial to make out a cause of action. Of these the endorsement of the payee is necessary; without it the plaintiff has no title to the note and no right to collect the amount due on it. Whether he is a lawful holder or not is a conclusion of law arising from facts to be proven and which should be stated.

It is the plaintiff's opinion that he is such lawful holder, but he can only make proof of it by showing that the payee endorsed it.

There are some sections in the Code which direct some defects in pleading to be disregarded, and others for the amendment of pleadings when necessary. Under these, doubtless, the court might in the exercise of their discretion, refuse to notice any technical objections whatever. To some extent it is proper to do so. But there can be no great objection to requiring parties to state the necessary facts without which their rights cannot be established. We have followed

N. Y. Court of Common Pleas.—Brophy v. Rodgers.

that rule heretofore and an adherence to it, while it leads to a little more care in the first instance, serves to lessen the difficulties on the trial of causes, by rendering unnecessary the proof of many facts which by such a course of pleading will be admitted.

Where the defect is purely technical we allow the amendment without imposing costs as a condition of amendment, until the practice under the Code shall be fully settled. When the defect is in substance, costs should be imposed. In the present case the objection is of the former character and the plaintiff may amend his complaint in this respect:

BROPHY V. RODGERS.

To authorize the arrest of a defendant, it must appear by the affidavit, that he is a non-resident or is about to remove from the state.

That he is going to California is not sufficient. It must appear by the affidavit that he is going with an intent to take up his residence there. If it is shown that the intent to remove was not with the view of changing his place of residence the order for arrest will be revoked.

THE defendant was arrested and held to bail on an action of slander upon an affidavit that he was about to depart for California. He moved at the special term to set aside the arrest, and *Daly, J.*, after hearing the plaintiff's counsel, ordered that the defendant be discharged.

The plaintiff appealed to the general term.

ULSHOEFFER, J.—We have already decided the point involved in this appeal, holding that the defendant cannot be held to bail unless he is a non-resident, or is about to remove from the state. Going to New-Jersey, Pennsylvania or California is not *removing* within the meaning of the act. It means a removal for a change of residence. One going to New-Orleans and having his life insured, is not to be held to bail, unless his intention to remove there, with some permanent view, appears by the affidavit authorizing the arrest; and if it is shown by the defendant that he had no intent to remove with the view of changing his residence, the order for arrest will be revoked. I think the judge was right in directing the discharge of the defendant, but he should have prescribed as a condition that he would bring no action for the arrest. Unless the defendant, therefore, so stipulates, the order discharging him will be revoked; but if he enters into a stipulation within five days after service of notice of this order, the order of the judge will be affirmed.

Surrogate's Court.—In the matter of Mary Welsh, deceased.

Surrogate's Court.

[New-York County.]

Before the Honorable ANTHONY L. ROBERTSON, Surrogate.

IN THE MATTER OF PROVING THE LAST WILL AND TESTAMENT OF MARY WELSH, DECEASED, AS A WILL OF REAL AND PERSONAL ESTATE.

Undue influence may be proved directly, or it may be a matter of presumption from facts unrebutted by the party charged therewith.

Diminution of mental power at the time of the execution of a will accompanied by suspicious circumstances as to its origination and mode of execution, requires proof of prior instruction or complete recognition of every part of the will as the free act of the decedent.

In such case, there must be proof of intellection of the instrument and spontaneity as to its origination.

The character of the instrument itself is material in determining the question of intellection.

An appointment as executor is sufficient interest in a party procuring the draught of a will and conducting its execution, to raise a presumption against its spontaneous character; the degree of interest only affects the weight of countervailing evidence.

Such interest, though rendering under the civil law a testament "*inefficacious*," only renders it presumptively void at common law. In all cases of impaired capacity, where a party interested prepares the will, the burden of proving understanding and volition is thrown on the party propounding the will for probate. Cases adduced in support of this.

Any confidential relation between testator and legatee, whether in the capacity of attorney or otherwise, and any dependence by the former on the latter, throws on the latter the burden of proving spontaneity in any gift made to him.

The suddenness of a resolve to make a testamentary disposition is not of itself sufficient to invalidate a will, but renders the demand for proof of its voluntary character more strict in a case of impaired capacity of the testator, and confidential relation in the party benefitted who conducted the preparation of the will.

The character of a solicitor employed by the party benefitted to draw the will and superintend its execution, is wholly immaterial, except in regard to questions of veracity. Prepossessions and bias may exist without either conspiracy or wilful perjury.

The duty of a solicitor employed by a party benefitted to draw a will, is "to probe the mind of the testator and ascertain he was acting by his own impulses."

Mere reading of the will to a testatrix and her acknowledgment of it, held not sufficient to determine volition under the circumstances of impaired capacity and the preparation of the will by the party benefitted.

The presence of the party benefitted during the execution of a will in cases of impaired capacity, is a material circumstance in determining the propriety of the means used for testing the volition of the testatrix.

Mere proof of an intent to do some testamentary act is not sufficient to repel the presumption of undue control, unless the act be of a similar kind with that executed. The question in such cases is of an intent to execute the particular will.

Part of a will may be refused probate on the ground of undue influence in obtaining it, the same rule prevails as in case of incompetency during the execution of part.

The circumstances sufficiently appear in the opinion of the court.

W. Silliman, for producent.

A. Blanchard, for next of kin.

THE SURROGATE.—The will propounded for probate in this case by the executor named therein, is contested by the next of kin, as

Surrogate's Court.—In the matter of Mary Welsh, deceased.

having been the result of undue influence exercised by parties benefited, and they claim that the probate should be refused.

Undue influence may be proved by direct evidence of importunity or the practice of arts upon the decedent by the supposed agent, or may be presumed from the proof of facts which throws upon the party seeking to establish the will in question, the burden of proving it to have been the result of free agency and complete understanding of the contents; and this case is put by the contestants on both grounds, but of the former species of evidence, there is but little trace in this case, except mere conjecture as to the object of visits of the party implicated, to the decedent, not sufficient to merit much consideration; and I shall therefore proceed immediately to consider the presumptive evidence which requires countervailing proof to overthrow it.

The first point to be looked at in this connexion is, the position and character of the decedent. She was a widow upwards of eighty-five years of age, possessed of an estate of upwards of twenty thousand dollars, consisting of about twelve thousand dollars of real estate and the residue of personal, which seems to have been derived from her deceased husband. She had no descendants, nor was there any one who seems particularly to have been intended or selected by her as the objects of her posthumous bounty. She lived alone with a very aged companion, and was dependent on several persons, strangers to her blood, for occasional services in her household and small matters of business; her own relations, with two exceptions, resided at some distance from her and visited her occasionally. Some of her husband's relatives resided more near her, and visited her more frequently. The decedent died of a pulmonary disease, about eleven o'clock of the evening of the day the will was executed, which took place about two o'clock in the afternoon. The natural character of the decedent, or as it developed itself towards the end of her life, is to be gathered from the testimony of all the witnesses.

The testimony of Mrs. Sawyer, Mrs. Knapp, and Dr. Underhill show her to have been set in her ways, not easily persuaded, opposed to making a will and resisting medical directions. The admissions of Mr. Cox show her to have been a woman of considerable mind and a good deal of independence, impatient of advice, leading to mismanagement of her affairs by accumulating idle hoards in banks, amounting at her death to 2700 dollars while she had 1600 dollars loose cash in her house.

This kind of self-reliance is rather opinionativeness than independence, and is not inconsistent with a liability to be governed if properly approached; still it requires some evidence to show that the energy which gave character to the obstinacy had failed, and that nothing remained but the unreasoning caprice; or that acts had been practised which turned her strength to her destruction; for this purpose the condition of the party must be examined at the time of the *factum*.

The disease affecting the decedent at the time of her death was lingering and exhausting, so much so as to prevent rest except in a

Surrogate's Court.—In the Matter of Mary Welsh, deceased.

sitting posture in a chair. Though not likely directly to affect the mind, it still must have greatly impaired its energies at so advanced an age so shortly before her decease.

This effect was visibly and rapidly approaching towards the close of her life according to the testimony of Mrs. Sawyer, young Mr. Shepherd, and Drs. Underhill and Hyslop, particularly as regarded her physical strength; her faculty of memory was evidently much damaged, particularly as regarded claims on her bounty and affection; her forgetfulness of Miss Shepherd, Miss Test and Mr. Heins show this.

At the very time of execution her infirmity and failing strength must have been apparent, for though she expressed no inability and was not asked if she could write, Mr. Barker, the draughtsman and subscribing witness to the will, suggested that she should make her mark instead of writing her name, which could only have originated from some appearance of great weakness.

The character of her signature confirms this, and the only circumstance relied on by Mrs. Gattey as proof of her strength, her never lying in bed, is shown to be a necessity arising from her disease; there existed in her case perhaps neither delirium nor *absolute* torpor, she was able to answer ordinary questions or salute an acquaintance but this does not establish competency for every act.

But as observed by Sir John Nichol, "it is a great but not uncommon error, that if a person can understand a question put to him, and can give a rational answer, he is of perfectly sound mind and is capable of making a will for any purpose whatever, whereas the true rule of law, and it is the rule of common sense, is, the competency of the mind must be judged of by the nature of the act to be done and from a consideration of all the circumstances of the case." *Marsh v. Tyrrell and Harding*, 2 Hag. Ec. Rep. 122. In regard to the testimony of Mr. Barker, it appears he had no previous knowledge of the testatrix and all the means he used to test her soundness are before the court, from which they can make their own deductions; this I shall lay aside at present to examine hereafter in connection with another important question, the spontaneous character of this instrument. The result of all this testimony taken together I regard not as establishing absolute intestability, but only that species of diminution of mental power, which accompanied with any suspicious circumstances as to the origination or execution of the instrument calls for proof of prior instructions or complete recognition of every part of the will being the free act of the decedent. In making such inference I feel fully justified by the language of various cases: In *Brydges v. King*, (1 Hag. Ec. Rep. 265,) Sir John Nichol says, "at this advanced age; after this long illness; having been confined to her bed two months; being in extreme bodily debility ending in gradual dissolution, the deceased must so shortly before her death have been laboring under considerable infirmity." In *Montefiori v. Montefiori*, (2 Add. R. 366,) the same judge says, "The deceased was several months in a declining state, worse on the night of the instructions, and five hours before

Surrogate's Court.—In the Matter of Mary Welsh, deceased.

her dissolution this transaction begins ; I think it highly probable *a priori*, on the face of this statement that his capacity was impaired," and the same principle is further elaborated in the case of *Billinghurst v. Vickers*, (1 Phil. R. 193.)

This being established it next becomes necessary to examine her intellection and the origination of the instrument. In regard to the first point had the case turned upon the question of such proof of understanding this instrument as the law requires in case of impaired capacity, I should have hesitated in coming to a conclusion, because something said by her appeared to show a knowledge of part of the contents of the instrument, inasmuch as she suggested giving a legacy to a person omitted ; but this, after all, is rather perception of what was omitted, an instinctive consciousness than a perfect understanding of its contents ; with this exception the case comes fully within the principle laid down in *Croft v. Day*, (1 Cart. 789,) that something must be said or done, showing the proper understanding ; the doctrine laid down in that case is corroborated by the cases of *Ingram v. Wyatt*, (1 Hag. Ec. R. 469 ;) *Wyatt v. Ingram*, (3 Hag. Ec. Rep. 466 ;) *King v. Farley*, (1 Hag. Ec. R. 502,) *Williams v. Goude and another*, (1 Hag. Ec. Rep. 595 ;) *Durnell v. Cornfield*, (1 Rob. Ec. R. 62,) and *Harwood v. Baker*, (3 Moore Priv. Coun. Rep. 290 ;) there is not a scintilla of evidence to show she recognised the scholarships or ecclesiastical bodies or their dissolution, mentioned in the will : but it is not necessary to pass upon the naked question of intellection disconnected from the other of spontaneity.

This brings us to the consideration of the character of the instrument, by whom and under what circumstances it was prepared and executed. The will bequeaths various legacies in sums from three hundred to one thousand dollars, to different claimants on her bounty to the extent of upwards of one fourth of her estate ; it then gives to the Episcopal Theological Seminary five thousand dollars to educate two indigent persons for ministers in that church, called founding two scholarships, one to be called the "Mary Welsh" the other "The Zion Church" scholarship ; the nomination to them to be vested in the rector for the time being of "Zion Church," in the city of New-York. It then bequeaths one thousand dollars to missionary purposes, and finally constitutes said Zion Church residuary legatee with remainder over in case of dissolution to the same Theological Seminary ; it also constitutes Mr. Cox, the rector of that church, sole executor with power of sale of the real estate. The will was drawn by Mr. Barker, who before had not known Mrs. Welsh, a vestryman of Zion church, at the request of Mr. Cox, who went with him and was present at the execution. It will thus be seen that "Zion Church" has great prominence in the will, and that though no part of this bounty is to come through that body as such, one of the scholarships is to bear its name and its rector is to nominate the students. The residuary estate at that time unknown, but probably estimated to be large from Mr. Barker's testimony as to the reputed wealth of Mrs. Welsh, is given to the church of which the sole executor who procured the will

Surrogate's Court.—In the Matter of Mary Welsh, deceased.

to be drawn by one of the vestrymen of that church, is rector. No layman is added to superintend the management of the secular part of these bequests, and the rigor of accountability of the executor to the residuary legatee might be considerably modified by a sense of gratitude to the person through whose instrumentality the bounty was obtained. I think therefore it cannot be denied that Mr. Cox is placed in the attitude of a party benefitted, or who may derive a benefit from the will, requiring investigation as to the spontaneous character of and the means taken by the counsel employed to ascertain it. The degree of that interest is immaterial, except perhaps as to the weight of evidence required to prove volition. In the case of *Tomkins v. Tomkins*, (1 Bail. S. C. 96,) a mere interest as guardian of certain children was considered sufficient to evoke the application of the principle which I shall apply in this case: That a court is bound to be vigilant in ascertaining that the decedent was acting on her own impulses, where capacity is impaired and the party directing the preparation and execution of the will is benefitted: This is not a modern doctrine, or one unsupported by experience. Swinburne says quaintly, (1 vol. 189,) "worthily and with great equity and reason is that to be deemed for no testament when the sick person answereth 'yea,' the interrogation being made by a suspected person," and he puts it both on the ground of suspected deceit as to the legatee and want of testamentary intention in the decedent. Under the civil law a preparation by an interested party rendered a legacy to him void, (Dig. Lit. 34, tit. 8,) under the modification of that law, adopted by English ecclesiastical courts, such preparation only throws the burden of proof of voluntary origination with the testator on the person propounding for probate. It is true that at common law, where a deed or contract is executed by a party not of unsound mind, he is presumed to understand its contents, and not to be acting under any undue influence, but in courts having exclusive control of the probate of wills of personal property it is otherwise; mere impaired capacity throws on the party seeking to benefit by an instrument made under it, the burden of establishing understanding and volition particularly when prepared by an interested party, a principle recognised by common law courts at least where wills of personal property are in dispute. (*Clark v. Fisher*, 1 Paige R. 176.) An unbroken series of cases in the English ecclesiastical courts, overhauled on appeal by common law judges, establish the doctrine incontrovertibly. Sir John Nichol in one case, *Marsh v. Tyrrell and Harding*, (2 Hag. Ec. Rep. 87,) says the party originating and conducting the transaction being present at all material parts of it, "the case proceeds to the evidence of the *factum* under presumptions of fraud and imposition;" in another, (*Billinghurst v. Vickers*, 1 Phil. R. 193,) "The presumption is strong against an act done by the agency of the party benefitted;" in a third, (*Peake v. Ollatt*, 2 Phil. 323,) "where the person who prepares an instrument, and conducts its execution, is himself an interested person, his conduct must be watched. Presumption and *onus probandi* are against the instrument," the same doctrine is reiterated in *Ingram v. Wyatt*, (1

Surrogate's Court.—In the matter of Mary Welsh, deceased.

Hag. R. 390,) *Durnell v. Cornfield*, (1 Rob. Ec. Rep. 62,) and stated in the elementary work of Swinburne (vol. i, 191,) and is adopted in the case at common law of *Tomkins v. Tomkins*, (1 Bail. 96,) and whatever may be the theory on which founded; whether the supposition that the benefitted party is presumed to have contrived the whole transaction, or the more extensive principle to which I shall presently advert, of being employed in the confidential capacity of procuring the will to be drawn and therefore to be watched, I consider it too well settled by decisions, and consistent with the common experience of mankind, to disturb or doubt it.

The additional ground to which I have alluded, why the case requires conclusive proof of volition and intelligence on the part of the decedent, is the confidential relation subsisting between the party benefitted and the testatrix.

Mrs. Welsh appears to have been an attendant on Zion Church of which Mr. Cox was pastor, and favorably disposed towards him, though opposed to the other officers of the church.

Mr. Cox, whose residence was nearly opposite hers, visited her for several years before her death frequently, and latterly almost daily, and it is but fair to presume that his visits, considering her state and his profession, were pastoral; The confidence arising from this must have been very great, so much so, that even the daily visits were not considered sufficient, and she complained that he did not come more frequently: The comfort therefore of his presence and the reliance upon his advice must have been very great; for such is the weakness of human nature, that we come to believe, that from the lips where flow religious instruction, nothing can come less pure; while on the other hand, the religious guide urged on by the zeal of his profession, and dazzled by the glory of the object, is blinded to the means used to obtain it. Statutes of mortmain are left as evidence of the danger, and the precautionary means adopted against it, in the case of ecclesiastics; and different municipal laws in all countries, have prescribed the cases, in which parties standing in a confidential relation to another, can take no benefit from them by a gift, particularly executory or prospective gifts; which rule there has been a constant tendency to extend. Thus the law of France, which in terms only mentioned "tutors," was by construction extended to schoolmasters, directors of the conscience and attendant physicians, (Pothier Donation entre Vifs, § 1.) and that, too, where the party was alive. The law of England establishes the general principle only, as one of presumptive evidence, and leaves the party claiming to be prepared with evidence in such case to rebut it. In *Griffin v. Robbins*, (3 Madd. R. 19,) the dependence arose from the infirmity of the donor and reliance upon the kindness of the interested party. In *Huguenin v. Baseley*, (14 Ves. 287,) the confidence arose from the party being a spiritual adviser. In *Vaughan v. Lloyd*, (5 Ves. 48,) the party was an agent. In *Dent v. Bennet*, (7 Sim. R. 546,) the party was a physician, but the Vice-Chancellor gave the instance of a clergyman, as an extreme case, in which he should apply the principle. In *Gibson v. Jeyes*, (6 Ves. 278,) Lord

Surrogate's Court.—In the matter of Mary Welsh, deceased.

Eldon states it to be "the great rule of equity, that he who bargains with a person, placing confidence in him, is bound to show that a reasonable use has been made of that confidence, a rule applying to trustees, attorneys or any one else." If this be so in regard to a contract, where the party imposed on has the fear of loss of what he parts with as a spur to his vigilance, how much more should it be so in regard to posthumous bounty, where the testator only directs how that shall go, of which death will certainly deprive him? The same principle is echoed in *Barrow v. Rhinelanders*, (1 J. C. R. 556,) where the simple relation of employer and clerk was considered sufficient for its application, and was applied with great effect in *Whelan v. Whelan*, (3 Cow. 572. 583.) Nay, so far has the doctrine been carried, that even after the state of dependence has ceased, if it has ever existed, the same scrutiny is exercised. Thus in *Osmond v. Fitzroy*, (1 P. Wms. 130,) where the party claiming had been the confidential domestic of a minor, and obtained after he was of age a security; in *Griffin v. Devenille*, (in Cox's n. to 1 P. Wms. 131,) where a minor had lived with a sister for a long while before coming of age, and had afterwards executed a security to her husband, in *Wright v. Proud*, (13 Ves. Jr. 137,) where a lunatic after restoration to reason executed a security to a keeper of an asylum for lunatics, the rule was applied though the relation had ceased. Whenever influence may be presumed, it is to prevail. *Evans v. Llewellyn*, 1 Cox, 334; also 4 Mylne & Cr. 269. And thus too regardlessly of the personal character of the party benefitted, (*Tomkins v. Tomkins*, 1 Bail. 96.) This being a general rule of law, it surely is not too harsh to apply the language of the eminent judge who pronounced the decision in the case of *Harwood v. Baker*, (3 Moore Priv. Coun. 290,) to this case, "Protection is most needed where the mind is too enfeebled to take in more objects than one, and most especially when that one object may be so forced upon the attention as to exclude all others that might require consideration."

The rule is inflexible and cannot yield even to the claims of a supposed scheme for advancing religion, particularly when tinged with sectarianism. The burden being thus thrown on this executor, of proving affirmatively good faith and a proper use of the confidence placed in him, it becomes necessary to examine the facts tending to show it. And first, it is to be observed that this rests entirely on the testimony of Mr. Barker, the solicitor who prepared this will and superintended its execution, in relation to what took place at "the *factum*:" There is no evidence of any declaration of any testamentary intention at any time; on the contrary, the declarations of Mr. Cox, and the testimony of Mrs. Sawyer, show that she had resolved to die intestate, that she considered the wills of her father and husband sufficient.

It must, therefore, be assumed, in the absence of proof to the contrary, that the intention of making a will was sudden, and that the intention of bequeathing so much to these religious corporations, did not exist until the day of her death. The suddenness of the resolve

Surrogate's Court.—In the matter of Mary Welsh, deceased.

undoubtedly is not sufficient of itself to invalidate a will, but it is a good reason for requiring stricter proof of its being voluntary, in case of impaired capacity and confidential relation.

In regard to the testimony of Mr. Barker, it must be received with some caution, not that I would imply the slightest suspicion of his good intentions, but in cases like this, he must in reference to the particular object of inquiry, be judged of by his conduct, and the same observations are applicable to Mr. Cox himself. The language of Lord Thurlow, in the case of *Wells v. Middleton*, (1 Cox R. 112,) may well be applied in this, "The character of those concerned in a transaction of this sort must be decided upon singly by those pertinent allegations and express proofs that are made in the course of a cause. It is impossible to go out of it, the court cannot receive allegations or admit proofs, not in the course of a cause, for if my private persuasion is, that none of that imputation does belong to the defendant in this business, yet that must not operate. Every man must come before me to be tried for what he has done in the transaction, it would be frivolous and useless to justice to do otherwise." Sir John Nichol, in *Marsh v. Tyrrell & Harding*, (2 Hag. Ec. Rep. 110,) observes, "There is no reason to suppose fraudulent conspiracy or wilful perjury necessary, to see the prepossessions under which they engaged; they may have suffered themselves to be lulled, and after having embarked in the transaction and their characters being implicated, they may be under a strong bias to give effect to the act. Under that bias, very honest persons may deceive themselves without being aware of it, they fancy impressions to have existed, nay they sometimes suppose facts to have taken place because those impressions now exist, or because those facts might or ought to have passed to support those impressions." In numbers of cases, where the most respectable solicitors have been employed, where no base motive could be imputed, it was held that the counsel who drew the will and superintended its execution neglected his duty, (*Ingram v. Wyatt*, 1 Hag. Ec. R. 441. *Baker v. Batt*, 1 Ant. 132. *Marsh v. Tyrrell & Harding*, 2 Hag. Ec. 134. *Croft v. Day*, 1 Curt. 840,) and therefore, being in a measure on trial, necessarily must be looked upon as a partisan. In this case, there is additional extrinsic evidence of some bias. In this case, the counsel could not have been but prepossessed with the previous information, that the testatrix would make such a will, and it is worthy of observation, the person from whom he received such information is not produced; there was nothing, therefore, new, strange or suspicious in the suggestion; he was anxious that the will should be made as it was, and perhaps from the best of motives; but he was, therefore, also a person least likely to observe or recollect any repugnance to the execution of the will, suspect any sinister influence or notice any weakness of mind. Under these circumstances, the sole question remains, whether the facts testified to by Mr. Barker, making due allowance for any coloring arising from his impressions at the time, show proper means used, "to probe the mind of the testatrix and ascertain that she was acting by her own impulses," or that

 Schenectady County Court.—*Truax v. Clute.*

as much part of wills as if incorporated therein and draw the will down to their date as if then republished are frequently rejected, (*Crosbie v. M'Douall*, 4 Ves. 610; *Sherer v. Bishop*, 4 Bro. C. C. 55,) (*Brounker v. Brounker*, 7 Phil. 57,) leaving the will to stand; in fact the courts of probate exercise complete control over the will in case of fraudulent insertion in the testator's lifetime or incapacity during the execution of part. (*Billingshurst v. Vickers*, 1 Phillim. 187; *Wood v. Wood*, Ib. 357; *Trimblestown v. D'Alton*, 1 Dow (N. S.) 85,) and there is no possible reason for not exercising the same power where part of the will may be supposed to be the result of undue influence. If the jurisdiction is conceded, the reason for exercising it in one case is as strong as in the other. I shall therefore admit to probate that part of the will which is free from imputation being all except the residuary legacy, and the appointment of Mr. Cox as executor. I had some little doubts as to the first legacy to found the scholarships, but the benefit is so little of a personal character that I think it may be allowed to stand, particularly as according to the testimony of Mrs. Knapp, the decedent showed a favorable inclination towards such institutions; the management of the funds is vested in a body in which Mr. Cox has no more interest than any other person, and the mere power of selecting the individual to be educated is too remote to come under the rule I have laid down.

The will must therefore be engrossed without the part rejected, and annexed to the probate. As the contestants have failed in part of their opposition they must bear their own costs; the costs and reasonable expenses of proving the will to be paid from the estate.

Schenectady County Court.

Before the Honorable W. S. JONES, County Judge.

STEPHEN TRUAX, respondent, v. JOHN B. CLUTE, appellant. 22d
March, 1849.

APPEAL FROM JUSTICES' COURT.

On an appeal from a decision of a justice of the peace, the county judge has the power to grant an order extending the time for the respondent to make and serve the counter affidavit referred to in § 309 of the Code.

Where an order was granted staying the proceedings of the appellant and extending the time for the respondent to make and serve an affidavit, on his part, in ten days, and such order was dated the 1st March, and was served on that day, and the last day of the ten days was on Sunday the 11th March, and the respondent did not make and serve his affidavit till Monday (the 12th):—Held, that the affidavit was served in due time, and could be received and read on the hearing.

THE appeal in this case was brought in February, and noticed for hearing by the appellant before the county judge on the 5th March last. The respondent, on the 1st March, applied to the county judge, *ex parte*, and on an affidavit obtained an order staying the proceedings

Schenectady County Court.—Truax v. Clute.

of the appellant, and extending the time for the respondent to make and serve an affidavit on his part in ten days, which order and affidavit were served the same day the order was obtained. On the 12th March, which was Monday, the respondent served his counter affidavit, which the appellant returned, and noticed the appeal for hearing for the 22d March. On the 22d, the appellant moved that the hearing be had on the affidavit of the appellant, only insisting that the counter-affidavit of the respondent ought not to be read. 1st. Because the Code, § 309, prescribes the time for putting in the affidavit, which is four days before the time *mentioned* for the hearing in the original notice of appeal, and the county judge has no power to make an order extending the time so prescribed. 2d. If the order was allowable, then the affidavit was not served in time.

Chesney, for the appellant.

B. F. Potter, for the respondent.

By the Court—S. W. JONES, *County Judge*.—I have no doubt of the power of the judge to grant an order enlarging the time for the respondent, in an appeal from the decision of a justice of the peace, to make and serve the counter-affidavit mentioned in § 309 of the Code. The appeal is perfected and becomes an action in the county court if the affidavit is made and the copy, with proper notice, is served on the part of the appellant, as required by § 303 and 304, whether the respondent makes an affidavit on his part or not. This fact brings the case within the purview of § 366, and authorizes the judge to enlarge the time in which *any* proceeding may be had by either party. The counter-affidavit of the respondent is in the nature of an answer to the allegations of the appellant, and there is no more reason for supposing that the time for putting in this affidavit is incapable of enlargement by order of a judge, than that the time to answer a complaint is so fixed by § 125 that it cannot be enlarged. The time for doing either may be extended on proper grounds being shown therefor. The order is therefore regular, and warranted by the Code, § 366.

But it is said that it was not served within the ten days mentioned in the order. If the propriety of its being allowed to be read on this hearing depended upon its being so served, I should be obliged to reject it. But I consider it served in time, although the order was obtained and served on the 1st March, and the affidavit was not served until the 12th March, because the last of the ten days mentioned in the order was *Sunday*. The respondent, on the first of the month, had ten days given him to do a certain act, and by the general rule for computing time, laid down in § 368, by excluding the first and including the last day, he would have all day on the 11th to perform it; but that section also says, "if the last day be Sunday it shall be *excluded*"—it is not added that in such case the first shall be *included*, and I therefore read the section as if the word *excluded* had read, shall

Surrogate's Court.—In the Matter of Mary Welsh, deceased.

she exhibited it voluntarily by her acts or deeds. In this view, any thing which simply establishes a capacity to understand the will and means of understanding it by proper reading, is not sufficient, but it must be determined whether it appears by her own suggestion, freed from any influence, she wished to give away three-fourths of her property to these religious bodies, cutting off her own and her husband's relations. Her mere acknowledgment of the will passes for nothing except as a compliance with forms; the expressive language of Chief Justice Wilmot, in *Bridgman v. Green*, (Wilm. 70,) would apply to such evidence, that "in cases of fraud and undue influence, it proves nothing, for the same power which produces the one produces the other," nor is the mere reading, under the circumstances, sufficient. *Croft v. Day*, 1 Curt. 839, 840.

All the occurrences proved might have taken place, and yet her conduct been completely under another's control, a control which does not require bodily restraint or physical dependence, or fear to render it more complete, and which could not be detected, during Mr. Barker's short interview, particularly with his prepossessions, and only the means adopted which were used by him. If she had suddenly resolved by one posthumous act, to win the favor of heaven, which she had nearly forfeited by a long mismanaged stewardship of its bounties, it is strange no act or word signified it. The counsel refrained too, from using any means to ascertain if there were no other relatives or friends she wished to remember in her will, though she told him she had forgotten one; no wider diffusion of charity she might desire; even no other dispenser of her bounty than a clergyman removed from the business walks of life.

In this case, as the counsel had never previously been employed by her, and as he was under no alarm as to her speedy death, it seems strange that he did not ask her to give her instructions herself to him before reading the will; it also seems strange, that knowing Mr. Cox was a party benefitted, and might have originated the whole will, he did not as matter of caution request his absence from the room, as his presence was unnecessary, for the purpose of completing the execution. It is impossible to describe every phase of undue influence, but it becomes a habit which develops itself in the presence of the party possessing it, but the mind may rid itself of it during his absence; a well-formed resolution fades away before the accustomed look, tone or manner, by which the dominion is maintained. Such is the doctrine laid down by Sir Herbert Jenner, in *Croft v. Day*, (1 Curt. 839, 840.) "If Mr. Dufaur, the party benefitted, had suggested, as he ought to have done, that under the circumstances of his being the person benefitted by the codicil, and the instructions being in his handwriting, that he should withdraw from the room and questions should be addressed to the testator, as to whether he knew the contents of the instrument, and whether it was in accordance with his wishes and intentions, as it was supposed to be, the case would have worn a different aspect," but not only did the counsel not thoroughly investigate the matter according to his own account, but there is some discrepancy

Surrogate's Court.—In the Matter of Mary Welsh, deceased.

between his testimony and that of Mrs. Gattey, the other subscribing witness, as to what took place at the time of the execution.

If Mrs. Gattey's testimony were to be relied on, there would have been an imperfect execution of the instrument; but I do not believe either witness meant wilfully to misstate a single fact, and I must believe that Mr. Barker, being evidently, from the attestation clause, familiar with the forms, neglected no duty in those particulars, but it shows the danger of relying on the accurate memories of witnesses in a hasty interview as to the means used to ascertain the voluntary origin of the will, or in fact any of the language or conduct of the decedent.

It is true, there was undoubtedly some expression by Mrs. Welsh of a wish to do some testamentary act at the time, because she admitted to Mr. Barker she had given directions for some will, though she did not recognise and was not shown the pencil memoranda made by Mr. Cox, nor was it shown what were the instructions given by her. The rules laid down in *Ingram v. Wyatt*, (1 Hag. Ec. Rep. 469,) is that "direct proof is necessary that the deceased clearly understood and freely intended to make that disposition of his property which the will purported to direct." In *Middleton v. Forbes*, (1 Hag. Ec. Rep. 398 *in notis*.) the will was refused probate, though there was a conversation about a will, but not explaining what the will was, and the instrument was read over; on the ground of the failure of proof, though no fraud was established, and in the case of *Bridgman v. Green*, before cited, Ch. J. Wilmot says, "in cases of undue influence and imposition, instructions prove nothing, for the same power which produces the one produces the other, and therefore instead of removing such an imputation it is rather an additional evidence of it." And it is to be remembered that the critical question in this case is not whether Mrs. Welsh understood this will, for she probably had faculties competent to that task, nor whether she was induced to execute a will, when having no testamentary intentions at all, but whether spontaneously she meant to execute such a will as the present.

In reviewing these conclusions I am of the opinion that the faculties of the decedent were so deteriorated as to let in proof of the mode of preparing the instrument and presenting it to her mind, that its preparation under direction of a party benefitted by it, and standing in a confidential relation, raises the presumption of undue influence, that the person and means employed to discover spontaneity were not those calculated to rebut that presumption, and that the portions of the instrument from which he derives any benefit must be rejected.

It only remains to inquire if the whole will must stand or fall; if the question were *res integra*, both on the score of justice and policy, the power of sustaining part and rejecting part should be upheld; Justice, because it would be hard that those who were voluntary and natural objects of bounty should suffer by the acts of another; policy, because the fraudulent contriver might throw into the instrument probable gifts to color the transaction on one hand, and seal the mouths of witnesses on the other; but the law has been settled on this point long since. Shelf on Lun. 333; 2 Law Lib. 212. Codicils which are

Court of Common Pleas.—*Coles v. Bullman.*

the defendant afterwards got into his own possession, and the court held, that the plaintiff might waive the tort, and recover as for goods sold and delivered in *indebitatus assumpsit*. Here the defendants, though guilty of no fraud, has had the benefit of the goods, and promised to pay for them. The plaintiff may also recover on the count for money paid. *Brown v. Hodgson*, (4 Taunt. 189,) recognised in *Spencer v. Parry*, (4 Nev. & M. 770,) is an express decision to that effect. [Creswell, J.—There is this difference between that case and the present; that there the defendant had entered into no contract at all with the owner of the butter; here the defendant had ordered some tea of Young & Co., though not that which was delivered to him. *Maule*, J., the owner of the tea might have sued either the plaintiff or the defendant in trover; they were both wrong-doers.] Yes; but the receipt of the tea by the plaintiff was not illegal, so as to bring him within the decision of *Merrewether v. Nixon*, (8 T. R. 186,) that wrong-doers cannot have contribution against each other. And here the plaintiff is not asking for contribution, but that the defendant may bear the loss. [*Maule*, J., the defendant having sold the tea, it seemed to me that the plaintiff would rather recover the price as money had and received; for supposing the defendant had sold it ignorantly at the lower price, it would be hard to make him liable for money paid as at the higher rate.]

Lush, in support of his rule. First, affidavits cannot be used. [*Coltman*, J., the affidavits are out of the question, they cannot be used.] In order to support the count for goods sold and delivered, there must have been originally a contract of buying and selling between the plaintiff and the defendant. *Seymour v. Pychlan*, 1 B. & Adol. 14; *Brown v. Hodgson*, 4 Taunt. 189.) The character of the original transaction cannot be altered when once a right of action has accrued to either party. [*Maule*, J.—Perhaps one party only might not be at liberty to treat this as a contract for sale, but may not both agree to do so?] There is no evidence that they did; the defendant's promise was to pay Young & Co. the same price, and not the carrier. The plaintiff cannot recover on the count for money had and received; he must prove, first that the defendant received the money to the use of the plaintiff; and, secondly, he must define the amount. [*Maule*, J.—I doubt if there be any such rule as that you have just stated as to defining the amount. What remedy could a plaintiff have when he could only sue for money had and received, but could not prove the amount? Surely it would be for the jury to say what amount the defendant had received.] In the present case there was no evidence as to the quantity of tea sold by the defendant, nor as to the contract on which he had sold it; it might have been on credit, and he might not have received one farthing. [*Maule*, J.—Have you any thing more to urge as to the count for goods sold and delivered?] I have not.

COLTMAN,* J.—I think there was some evidence to disentitle the

* The Chief Justice was absent.

Points in Equity.

defendant to enter a non-suit; and that it supported the count for goods sold and delivered. The goods were not delivered originally upon any contract of sale between the plaintiff and the defendant; but if they chose subsequently to agree that the transaction should be of that nature, it was quite competent for them to do so and they would be bound by it. Here the evidence supports the view, that such an agreement was entered into, for the defendant promised to pay the plaintiff for the same he had ordered of Mr. Young, and the plaintiff was at liberty to enforce the performance of that promise by action.

MAULE, J.—I am of the same opinion. The evidence meant that the defendant would pay the lower price for the goods at all events. Had there been no mistake, he would have been clearly liable to pay Young & Co. for the inferior tea; and having received and enjoyed the benefit of the better tea, there could be in honesty, no reason why he should not promise to pay the carrier for it—at least, the value of what he had ordered, application for payment being made on behalf of the plaintiff, and not of any other person. Not only might the jury make the inference that he so promised but I am disposed to think that they were bound to make that inference.

CRESSWELL, J.—I also think that there was evidence to support the count for goods sold and delivered. In the first instance there was no contract of sale; the tea was delivered by the plaintiff in his character of carrier, and he, finding he had made a mistake, applied to have the tea back again, when the defendant said, “as you made the mistake, you must put up with the inconvenience.” And the defendant afterwards agreed to pay for the same as he had ordered of Mr. Young. The meaning of this was, “On a former occasion I told you that you must settle with Mr. Young, but now I say that I will pay you at the same rate as I should have had to pay him for what I ordered.” This was some evidence to go to the jury.

Rule discharged.

POINTS IN EQUITY.

ALIEN.

BRITISH SUBJECT BORN IN AMERICA.

A., who was by birth an Englishman, emigrated to the United States of America after the recognition of their independence by the treaty of 1783, and took the naturalization oaths, married an American woman and had a son by that marriage, (B.) born in the United States. B. had a son (C.) who was also born in America. In a suit in the English Court of Chancery it was held that C. was capable of inheriting real estate in England as a British subject. *Fitch v. Weber*, 6 Hare, 51.

not be counted as part of the time. The provision of rule 64 of the old supreme court, and of rule 63 of the present supreme court, was probably intended to be adopted by the Code. Sunday thus being the last of the ten days, and falling on the 11th of March, service of the affidavit on the 12th of March, was within the time allowed by the order. It is said this construction will conflict with § 362, prohibiting a judge out of court from *staying proceedings* for a longer time than ten days, without previous notice to the opposite party. The answer to this is, that the stay of proceedings was merely to prevent the hearing of the cause, and is confined to ten days. The order enlarging the time to serve the affidavit is a different matter, and its extent is not limited except by the legal discretion of the judge.

But this affidavit is entitled to be read without reference to the time given in the order. It was made and duly served on the 12th of March, and the *time for hearing* is this 22d March; it is, therefore, served "at least four days before the time for hearing," which is all the condition imposed upon the respondent for the admission of the affidavit on his part, by § 309. The appellant has had double the time that the Code allows for considering that affidavit, so that he cannot complain of any surprise, and the respondent is within the language as well as the spirit of the Code. In *Tullock v. Bradshaw*, 6 N. Y. Legal Observer, 318, this court examined the words "the time for hearing the appeal," occurring in § 304, and decided that in support of the proceedings taken, they did not mean the time *designated by the appellant* for hearing the appeal, but the *actual time* for hearing it. The same words in § 309 ought to receive an equally liberal construction in favor of the respondent, and his affidavit must be received and read on the hearing.

ENGLISH CASES.

Court of Common Pleas.

COLES v. BULLMAN.—27th May, 1848.

JUDGE'S NOTES OF TRIAL—GOODS SOLD AND DELIVERED—EVIDENCE.

Affidavits cannot be used to supply alleged omissions in a judge's notes of evidence in a trial before him.

The plaintiff, a carrier, was entrusted by Y. to deliver good tea to A. and inferior tea to the defendant. By mistake he delivered the good tea to the defendant, who appropriated it. The plaintiff paid Y. for the good tea and applied to the defendant to re-deliver it, who said, "As you have made the mistake you must put up with the inconvenience," but subsequently he agreed to pay the plaintiff for the same he, the defendant, had ordered of Y.—Held, that this was evidence to support a count for goods sold and delivered by the plaintiff.

THIS was an action of debt for goods sold and delivered, money had and received, money paid and upon an account stated. *Plea nun-*

Court of Common Pleas.—Coles v. Bullman.

quam indebitatus. The particulars of demand stated, that the action was brought to recover 20*l.* on the following account for goods sold and delivered :

“January 5th.

“Three half chests of duty paid tea, - - - £20.”

At the trial before the Secondary of London in March last, it appeared that the defendant, on the 2d of January, had purchased three half chests of inferior tea, at 11*d.* per pound, of Young & Co., and that one Phillips, about the same time, purchased of the same firm three half chests of a better quality. The plaintiff, who was a carrier, delivered the good tea by mistake to the defendant, and the inferior tea to Phillips, and on the 7th of January, the plaintiff's clerk informed the defendant of the mistake, and asked to have the good tea re-delivered to him; but the defendant said he had sold one chest of it and mixed the rest with other sorts, and added “As you have made the mistake you must put up with the inconvenience.” Upon a subsequent day he agreed to pay “for the same he had ordered of Mr. Young.” Phillips returned the inferior tea to Young & Co. On these facts the defendant's counsel applied for a non-suit, which the judge refused, and the jury found a verdict for the plaintiff for 20*l.*, leave being reserved to the defendant to move to set aside the verdict and enter a non-suit.

Lush having obtained a rule *nisi*—

Byles, Sergt., showed cause and proceeded to read affidavits for the purpose of showing that the Secondary's notes were inaccurate, and did not contain evidence alleged to have been given to the effect that the plaintiff had paid Young & Co., for the tea delivered to the defendant.

Lush objected that affidavits could not be read for that purpose, and also on the ground that the defendant had no opportunity of answering them.

MAULE, J.—I assume that the plaintiff had paid Young & Co. for the tea delivered to the defendant.

Byles, Sergt.—If that is the inference from the secondary's notes I am satisfied. This rule must be discharged if there was any evidence to go to the jury in support of either of the counts. First the plaintiff may recover as for goods sold and delivered. (*Biddle v. Levy*, 1 Stark. N. P. 20.) In that case goods were supplied and credit given to A., upon a fraudulent representation by B., but B. had the benefit of them, and was held responsible in assumpsit for goods sold and delivered. So in *Hill v. Perrott*, (3 Taunt. 274,) the defendant by fraud procured the plaintiff to sell goods to an insolvent, which

THE
New-York Legal Observer.

VOL. VII.]

NEW-YORK, JUNE, 1849.

[MONTHLY PART.

THE SECOND ARTICLE ON CONSTRUCTION, ENTITLED "DEEDS,"
WILL FORM THE LEADER OF OUR NEXT NUMBER.

LIABILITY OF ENDORSERS.

THE decision of the case of the *Cayuga County Bank vs. Ethan A. Warden and Franklin L. Griswold*, in the Court of Appeals, a report of which appeared in the April number of the *New-York Legal Observer*, appears to have changed the law in this state in relation to the liability of endorsers, and overrules the case of *Remer v. Downer*, 23 Wendell, 620. In that case, the question was submitted to the jury, "whether the notice of protest was sufficient to *apprize* the defendant of the dishonor of the note"—or, in other words, "whether the notice conveyed to the mind of the defendant information that the identical note in question had been dishonored," and the jury found in the affirmative, yet the Court of Errors decided that the endorser was not holden. In that case the jury came to the *same conclusion* on the facts that *the judge did* who delivered the opinion in the Court of Appeals in the case of the Bank *vs.* Warden & Griswold, but the judgments pronounced are entirely different. We have, then, two decisions, recently made by the court of final resort in this state, on the same conclusion of facts, standing in opposition to each other, and the question naturally presents itself to the profession, and the commercial community, which is correct. That two such distinguished and able jurists as *ex-Chancellor WALWORTH* and *Judge JEWETT* stand directly opposed to each other on the same state or conclusion of facts, certainly throws great doubt upon the question, and should cause any one who approaches the investigation of it, to do so with much hesitation and doubt.

The proposition is reduced to this—Does the liability of the endorser depend upon the state of *his own mind*, or upon the *acts* of the holder. Must the holder of an endorsed note give notice of the presentment and non-payment of *the* note in order to charge the endor-

 Liability of Endorsers.

ser, or may the holder *substitute* in place of *such* notice, either *in whole* or *in part*, the supposed *knowledge* or *information* of the endorser.

In the case of *Remer vs. Downer*, the point was distinctly met, and it was decided that the rights of the holder of endorsed paper to recover, depended *upon his own acts*, and in the recent case in the Court of Appeals, the point appears to have been presented with equal clearness, and to have been directly passed upon by the court, for on examining the printed points in the State Library, it will be seen that the defendant's counsel contended, that "the plaintiff's right to recover did not depend on the *mind* or *knowledge* of the defendants as to whether the note was paid or not, but upon the *fact* whether the plaintiffs had *performed the conditions* on their part, on the performance of which, *only*, the defendants agreed to pay the note in question," while the plaintiff's counsel insisted, that "the notice of protest served on the defendants was a sufficient notice to charge them as endorsers of the note in question; because, they will be presumed to have *known* that this note for \$600 became due at the time mentioned in the notice, when the note *intended to be referred to* was protested," and the whole *gravamen* of the opinion is, to show, *not* that the plaintiffs gave the defendants notice of the dishonor of the note in question, but that the notice which they did give, *when taken in connexion with other facts*, "conveyed to the mind of the defendants information that the identical note in question had been dishonored." It is no where pretended in the opinion that the *acts* of the plaintiffs were sufficient in and of themselves to charge the endorsers, but on the contrary thereof, it is the *mind* of the defendants, and that alone, which is looked at in the decision.

That such was once the rule in this state, by which the liability of endorsers were to be ascertained, is not denied; but was that the rule when the case of the Cayuga County Bank *vs.* Warden & Griswold was decided, and can it be sustained by sound and correct reasoning.

At the Jefferson county circuit, in June, 1841, before the case of *Remer vs. Downer* was reported, Judge GRIDLEY, in an action of debt against an endorser, doubted the correctness of the rule, and thought the endorser was discharged, but he felt bound, under the decision of the Supreme Court in the case of *The Ontario Bank vs. Petrie*, 3 Wendell, 456, to submit the question to the jury, whether the defendant had been misled—or, in the language of Judge Jewett, whether the notice of protest "conveyed to the mind of the endorser information that the identical note in question had been dishonored," and the jury found in the affirmative, and rendered a verdict for the plaintiffs. On a motion for a new trial, BRONSON, Judge, is reported to have said, (2 Hill, 593,) that the recent decision in the Court of Errors, in the case of *Remer vs. Downer*, had shaken the former decisions of the Supreme Court, and rendered it necessary to consider the question upon principle, and a *new trial* was ordered.

It is proposed briefly to review the question, and present some considerations why the rule laid down in *Remer vs. Downer*, and *Ransom*

Liability of Endorsers.

vs. Mack, should be followed *hereafter*, instead of the one laid down by Judge JEWETT in the case of the Cayuga County Bank *vs. Warden & Griswold*.

If it may be assumed as admitted, "that it is important to establish some fixed and certain rule as to what shall be a sufficient description of the note, in a notice of dishonor, so that the holders of negotiable paper, and those who are contingently liable for its payment upon the fault of the parties who are primarily liable, may know and understand their rights and duties in each particular case that may arise," then the rule laid down in *Remer vs. Downer* and *Ransom vs. Mack*, is correct; but, that is one of the very questions in dispute, for if accessory facts may be let in to aid or help out a defective notice, then it follows as a matter of course, that the notice may vary according to the accessory facts, as they shall be few or many, weaker or stronger, or in other words, the sufficiency of the notice is *then* to be ascertained by the accessory facts, and not by any fixed or certain rule, as by comparing the note "*intended* to be referred to in the notice of dishonor," with the description contained of it *in the notice served*. In some cases the accessory facts may be so strong as to override entirely the notice given, and thus the notice, when taken in connection with *those accessory facts*, may convey to the mind of the endorser information of the identity of the note dishonored, although it should misdescribe the note as to the parties, amount, and every other particular, or should be a blank notice and not describe it at all.

If accessory facts may be used to aid, or help out, a defective notice, *how far may they be used?* If good in *part*, why not good in *whole*, and thus notice of presentment and non-payment to the endorsers be entirely dispensed with. If the mind of the defendant has any thing to do with his liability, it must be immaterial *how* that state of mind is produced, or that information conveyed to it, unless it can be maintained as good law and sound logic, that that state of mind must be produced, or that information conveyed to it, in a *particular way*—partly by the notice and partly by the accessory facts; but if that is the rule it defeats the other proposition, for then, the state of mind of the endorser, or the information conveyed to it, would not govern, but the *mode or manner* in which that state of mind was produced or information conveyed to it; and, *perhaps*, the *proportions* which the notice and the accessory facts respectively had in producing that result.

It will be found on examination, that the rule laid down by Judge JEWETT, cannot be carried into active practice without producing the worst of consequences, not only to endorsers but to the holders of endorsed paper, by placing their right to recover, not within their own control and dependent upon their own acts, but by making their rights to depend on the "information which the notice conveys to the mind" of the endorser. It will not be contended, that the mind of the defendant may be looked to, *to aid a recovery*, and not *to defeat one*. If the plaintiff has a right to show what information a notice of dishonor conveyed to the mind of the defendant, in order to

Liability of Endorsers.

ascertain whether it is a sufficient notice to charge him as an endorser, the defendant has, of course, a right to rebut the evidence, and show that it did not convey such information to his mind. It follows then, conclusively, that if the mind of the defendant may be looked into, in order to *aid a defective notice*, it may be looked into in order to *defeat a perfect one*. The issues at the circuits will then be, not whether the holder has given notice of the dishonor of the note in question, but what information the notice served, *when taken in connection with the accessory facts in each particular case*, conveyed to the mind of the defendant. Accessory facts will then be met by accessory facts, and the business tact and skill of each endorser will become a legitimate and important subject of inquiry upon the trial of every cause. There is not a foreigner in the state, whether he be French or German, Jew or Gentile, who cannot defeat a recovery against him as an endorser, if he cannot read English, and that language is used in the notice of dishonor served, if the rule adopted in the case of the Cayuga County Bank against Warden & Griswold be correct.

The error of the rule cannot be better illustrated than by reference to the case under review. Suppose on the re-trial of the cause ordered by the Court of Appeals, the defendants could show that one or both of them had been taken suddenly ill, and was in consequence thereof laboring, on the third day of May, eighteen hundred and forty-five, under a temporary derangement, would it not be an impeachment of the integrity of the court to suppose that in such a case the language of the court would be otherwise than "who can doubt but that this notice did *not* convey to the mind of the defendants, information of the identity of the note dishonored." Do the rights of the holders of endorsed paper depend upon such contingencies? and if not, do the liabilities of endorsers depend upon them?

Take another illustration. The endorser lives in a country town where the mail is received but once a week, and the note is protested at the county seat on Monday after the mail has left, and the notice of it is deposited in the post-office directed to him, but which he will not receive by due course of mail until the next week on Monday; on Tuesday after the note is protested, it is sued, and on Wednesday the endorser is served with a summons and complaint, and that too, before he has received the notice, and before it has "conveyed any information to his mind." What then becomes of the reasoning of the judge in the case above referred to?

Who is to judge whether the note is correctly described in the notice of protest, the court or the defendant? In the case above referred to the court undertakes to tell what kind of a judgment the defendants formed, and to substitute *that* as the judgment of the court. It is a dangerous rule for deciding causes, and one by which the liability of defendants must vary according to the intelligence of each particular endorser.

But the most objectionable feature in the decision of the case of the Cayuga County Bank against Warden & Griswold, is, that it makes the terms and conditions of one independent contract, depen-

Liability of Endorsers.

dent upon the existence of other independent and separate contracts, and the terms and conditions of them, thus permitting the notice of the dishonor of *one* note to vary, as there are few or many *other notes* endorsed by the same defendants. It is entirely clear from the evidence, and the opinion that if Warden & Griswold had been endorsers of a three hundred dollar note, payable at the Cayuga County Bank, and falling due at or about the time the note in question did, although given to and held by some one, other than the bank, that the court would have held the notice of protest served, insufficient to charge them as endorsers of the note in question for six hundred dollars. Cannot the court tell, *as a question of law*, whether the notice correctly described the note in question, as well without knowing whether there were other notes endorsed by the defendants payable at the same bank as with? Suppose there were other notes, how could that affect the question whether the note in suit was or was not correctly described in the notice of protest? The existence or non-existence of other contracts would not add one word, or dot an *i*, or cross a *t*, in either the note or notice. How then could the existence of them, render a *correct* description *less* correct, or the want of them render an *incorrect* description *less* incorrect? Would not the papers *read the same* in either case? If the notice does not describe the contract correctly when other notes exist, it does not describe it correctly when they do not exist.

Notices of protest may be verbal or written; if written, the question is upon the written notice, *when compared with the note*. If it describe the note correctly it is sufficient, whether the endorser understands it or not, and its sufficiency can be ascertained with the same certainty, that it can be ascertained at the circuit whether the note produced is the one described in the declaration or complaint, and as *a question of law*, the same rule should govern in the one case as in the other, and the same variance which should prevent a note being read in evidence in the one case, should prevent its being read in evidence in the other; and it would be as pertinent to inquire at the circuit on a question of variance or misdescription between the note produced and the one described in the declaration or complaint, whether the defendant had made other notes, or what was the state and condition of his mind in order to ascertain whether such variance or misdescription existed, as for the purpose of ascertaining whether there is a misdescription between *the note produced* and *the one described in the notice of protest*.

Other and further reasons might be assigned in support of the views above expressed, but if what has been already stated, does not satisfy the understanding and convince the judgment, it is not supposed that any further argument will; and the final disposition of the question must therefore be left to be disposed of when some one shall interpose his *own ignorance* and inability to understand and know what is meant or intended by a written notice of protest as a defence to a recovery, and then, and not till then, may we hope for a final settlement of the question, whether the right to recover depends upon the *fact*, whether the notice is correctly described in the notice of pro-

U. S. District Court.—The United States v. The Brig Lawrence.

test, or whether it depends upon the information which the notice conveys to the mind of the defendant, *when taken in connection with the peculiar accessory facts of each particular case.*

LEGES.

H. S. District Court.

[*Southern District of New-York.*]

Before the Honorable SAMUEL R. BETTS, District Judge.

THE UNITED STATES v. THE BRIG LAWRENCE, HER TACKLE, APPAREL, &c., &c.—April, 1849.

To entitle a party to a peremptory attachment, the applicant must show that the preliminary proceedings have been strictly correct. Same rigor, however, not necessary to bring a party in court to answer matters touching a civil suit.

The practice of the state court governs in this court when not otherwise regulated by the specific rules of this court.

Under the Act of Congress of March 3d, 1817, a deputy marshal is subject to the same summary remedy in respect to moneys held by him officially that the marshal is.

The Act of 3d of March, 1817, applies to every grade of officers carrying into execution the powers of the court, and receiving moneys under their process or by their direction.

The marshal is immediately responsible for moneys coming properly in the course of official duty into the hands of his deputy.

Independent of statutory provisions, the courts of the United States have an inherent right and power to regulate their own process, and the disposition of moneys obtained under their process or order, and to compel observance of their rules by attachment.

The deputy marshal is an officer of this court and subject to attachment for contempt by summary order.

The resignation of office by a deputy marshal affects only the powers of the court over his executory acts; even his removal from office by order of the court, would not exempt him from liability for past contempts.

Specie in foreign coin, is not merely cargo, but money, and to be paid into court as such.

Depositing money into bank to the credit of the court, is paying money into court according to the Act of Congress, 1817.

Though strict formality in the proceedings is necessary to entitle to a peremptory order, yet if the affidavit of party proceeded against satisfies the court of his contumacy an order of attachment will be granted against him.

The marshal is answerable for acts of his deputy done "*colore officii*," although without his knowledge, and in the case of moneys received belonging to suitors, process of attachment may be had against the marshal personally.

If a deputy obtain possession of money belonging to suitors tortuously, and in fraud of the marshal's rights, the marshal is not amenable to summary process of attachment therefor.

THIS was an application for an order upon Eli Moore, marshal of the United States for the Southern District of New-York, that he forthwith pay into court the sum of \$20,000 in specie, attached on board the brig Lawrence, proceeded against by the United States on a charge of having been engaged in the slave trade, and which specie with other effects had been taken into custody by Wm. H. Peck and others, specially deputed by the marshal to execute the process of the court, or that a peremptory attachment issue.

A similar motion was made as to William H. Peck, the deputy,

U. S. District Court—The United States v. The Brig *Lawrence*.

who was exclusively and directly identified with the custody and withholding of the specie.

The facts are fully detailed in the opinion of the court.

J. Prescott Hall, U. S. District Attorney, for the United States.

F. B. Cutting, for the deputy marshal.

BETTS, J.—An order was granted by the court on the 21st inst., on motion of the United States' attorney, that the marshal of this district forthwith pay into court the sum of money attached by him in the above entitled cause. The hearing of the matter was deferred at the instance of the marshal until yesterday.

The order of the court was served on William H. Peck, chief deputy of the marshal, and concurrently with the motion against the marshal, the district attorney moves for an order that the said deputy pay the aforesaid money into court, or that an attachment issue against him.

It is objected on the part of the marshal, that no proof is made of personal service on him of the order of the court, and on the part of the deputy, that no order has been granted directing him personally to pay the money into court.

In order to lay a foundation for a peremptory attachment, it is incumbent on the applicant to show that his preliminary proceedings have all been strictly correct. (*U. S. v. Caldwell*, 2 Dall. 333.)

But the same rigor is not necessary to obtain an attachment to bring a party before the court to answer upon matters touching a civil suit. In such cases, the first proceedings may be by order that the accused party show cause why he should not be punished for the alleged misconduct, or an attachment may be issued to bring him before the court to answer for the misconduct, (2 R. S. 536, § 6,) and the practice of the state court governs this court when not otherwise regulated by its own specific rules, (C. C. Rule 102; D. C. Rule 340.)

The material question is, whether a proper cause is shown for the interposition of the court against the marshal or deputy, by process of attachment in the first instance, or by an order that they show cause why an attachment for contempt of court because of misconduct in office shall not issue against them.

Thus far the cases of the marshal and deputy have been considered as depending upon a principle common to both.

Upon the facts brought out, however, by the depositions read in court, it seems proper to separate them at this point and dispose of each on its special circumstances.

It appears that a monition and attachment against the barque *Lawrence*, her tackle and apparel, furniture, appurtenances, guns and the goods and effects found on board, and \$20,000 in specie, was delivered to the marshal on the 15th of March, 1848. He deputed Wm. H. Peck, J. S. Smith, Joseph Thompson, or either, to execute the process, and the same day it was served by Smith and Thompson by

U. S. District Court.—The United States v. The Brig Lawrence.

the arrest of the vessel and the specie. The specie was taken by Mr. Thompson to the Mechanics' Banking Association in this city, and left there subject to the order of Eli Moore, the marshal, and as Mr. Thompson deposes, on special deposit, according to his understanding.

The deputy, Peck, states in his affidavit that the specie attached was estimated at \$18,992, and no more; consisting of \$1000 in silver and several kegs of doubloons and half doubloons,—gold pieces of a foreign currency.

The \$1000 in silver were afterward by his direction placed to his credit by the cashier, and the gold coin was sold and the proceeds also passed to his credit in the bank. He says he has disbursed a portion of these moneys for the official services of the office, and that the total sum he has received in his official capacity, including these moneys amounts to \$133,000, or thereabouts, and that he has disbursed and expended for and on behalf of the marshal during that period the sum of \$126,000 or thereabouts, leaving about \$7000 in his hands, which he states he is ready to account for and pay over to the marshal. He farther says he resigned his office of deputy marshal on the 23d inst.

The resignation was made after these proceedings were initiated and notice thereof had been served on him.

On these facts the counsel for Mr. Peck takes two objections to the competency of the court to enforce an order, or issue an attachment against him.

1. Because, if the moneys in the cause came to his hands they were in judgment of law received by the marshal, and the deputy is not answerable for them by summary order of the court, nor by suit at law. The remedy of the parties interested in the moneys, must be taken against the marshal alone. That a deputy marshal is not an officer of the court amenable to the authority of the court by way of attachment for misconduct or malversation in his office.

2. That Mr. Peck is now no longer deputy marshal, and therefore in no way under the supervisory authority of the court in respect to his transactions when in office.

3. A subsidiary exception is taken that the specie cannot be regarded as money in the hands of the marshal, but only as cargo in his custody for safe keeping until the final decision and disposition of the cause, and accordingly not subject to be brought into court.

4. A farther point was taken under the terms of the Act of Congress of March 3, 1817, that an attachment cannot be awarded for not paying the money into court, but only on the refusal or neglect of the officer to pay it into an incorporated bank of the state to the credit of the court.

The main defence against this proceeding was placed on the first position, that a deputy marshal is not an officer of the court, in the sense to render him directly amenable to its supervision, and subject to attachment for not paying over money received by him, *virtute officii*.

U. S. District Court.—The United States v. The Brig Lawrence.

Whatever may be the rule at common law in respect to the direct liability of deputy sheriffs to suitors for moneys collected by process of court, it seems to me there is no ground for question, under the Act of Congress of March 3, 1817, that a deputy marshal is subject to the same summary remedy in respect to moneys held by him officially, that the marshal is himself.

The United States Circuit and District Courts are directed to cause all moneys, being subject to their order, to be deposited in bank, (sec. 1,) and section 2 provides that all moneys which shall be received by the officers thereof in causes pending in court, shall be immediately deposited in bank to the name and credit of the court, and section 4 directs that if any clerk of such court, or officer thereof, having received any such moneys as aforesaid shall refuse or neglect to obey the order of such court for depositing the same as aforesaid, such clerk or other officer shall be forthwith proceeded against by attachment for contempt (3 U. S. Statutes, 395).

If the court were called upon to expound the language of the statute for the first time, there would seem to be no reasonable ground for not giving it its full, plain and natural import, and apply it to every grade of officers carrying into execution the power of the courts, and receiving moneys under their process or by their direction.

Chief Justice Marshall clearly considered the law as embracing deputy marshals, for he awarded an attachment against a deputy marshal to compel the payment of money into court, collected on execution. No question was raised as to the just liability of that officer to this form of procedure. (2 Brockenborough R., 1, *U. States v. Man.*) This was in 1822. In 1844 the point was raised in the 6th Circuit, and Mr. Justice McLean, on a careful consideration of the statute, decided that the deputy marshal is an officer of the court, and subject to its power as such, and that he may be compelled by attachment to pay over money collected by him *virtute officii*. The judge remarked that it would be disreputable to the court and to the institutions of justice, if, in such case, the court could not afford a summary remedy against one of its officers. In that case, too, the deputy had received a portion of the money when he had no authority to receive it, the execution having been returned; and the court held he was reponsible for it, although the marshal was not. (*Bagley v. Yates et al.*, 3 McLean's R. 465.)

If the money had come properly, in the course of his official duty, into the hands of the deputy, the marshal would immediately be liable for it. Judge McLean holds that the deputy is no less so for that cause. (*Ibid.*) And it seems to be the rule in Massachusetts, not only that the sheriff is liable for the acts of his deputy done *colore officii*, but that such liability is consequent upon that of the deputy for the same acts. (1 Pickering, 275, *Knowlton v. Bartlett.*) In that case, his deputy attached money, after the process was *functus officio*, and embezzled it. The court held the sheriff was liable, because the act was done under color of office. (*Ibid.* 271.) The same doctrines are declared by Parsons, Ch. J., in *Marshall v. Hosmer*, 4 Mass.

U. S. District Court.—The United States v. The Brig Lawrence.

68; *Bond v. Ward*, 7 Mass. 127—and all the cases go upon the assumption of the personal liability of the deputy for the acts for which the sheriff was made responsible. In South Carolina the sheriff was held liable to attachment for moneys paid a clerk in his office, embezzled by the clerk afterwards. (*Abercrombie v. Marshall*, 2 Bay R. 9, S. P.; *Carter v. Ken*, *ibid.* 112.)

Independent of the statute referred to, the courts of the United States, under their inherent powers and the right to regulate their own process, possess ample authority to prescribe rules in relation to the collection and disposition of moneys obtained under their process or orders and to compel the observance of such rules by attachment. (*Bac. Ab. Attach't A, Comyn* (Dig. Day's ed.) *Attach't for Contempt of Court*, note 1, 3 D. & E. 351, 2 R. S., 543, § 1.)

Such rules are prescribed by the Supreme Court and by this Court.

In my opinion the deputy marshal is an officer of this court amenable to its jurisdiction for malfeasance in office by summary order or attachment for contempt. The marshal would be personally answerable under the terms of the rule of the Supreme Court 41, and of this Court 158, for failing to pay moneys attached by him, forthwith into court, and the responsibility of the deputy is no less stringent. So under the practice of the Supreme Court of this state, the sheriff is subject to attachment for not paying moneys collected by him on process, to the party or into court, although no demand is made on him therefor. *Brewster v. Van Ness*, 18 Johns. R. 133.)

2. It is earnestly contended that the resignation of his office by the deputy on the 23d inst., ousts the jurisdiction of the court over him. This is upon the assumption that the authority of the court by attachment cannot be exercised over any one, except he be at the time an officer of the court. This doctrine is correct as to executory acts. The court could have no power to compel the deputy to resume his office or proceed hereafter in the execution of his duties.

But this principle does not touch that of the rightful authority of the court in respect to acts and omissions of its officers, while acting as officers.

The power of the court to afford a remedy against sheriffs by attachment, after they leave office for malversation or neglect of duty in office, is one constantly exercised and has never been questioned.

In February term, 1810, the Supreme Court awarded an attachment against a late sheriff, for not returning a *fi. fa.* delivered to one of his deputies in 1797, to bring him into court to answer on oath to interrogatories. (*Brockway v. Wilbur*, 5 Johns. R. 356.)

He was afterward discharged on account of laches of the party prosecuting, the process having been delivered to a deputy more than fourteen years previously. (*The People v. Gilliland*, 7 Johns. 555.)

Equally direct is the case of *Brewster v. Van Ness*, 18 Johns. 133; and *The People v. Brower*, 6 Cowen. R. 41, and *The People v. Evans*, 4 Hill R. 71.

It is presumed the argument would not be advanced that the mar-

U. S. District Court.—The United States v. The Brig Lawrence.

shal, in this case, if the money in question came into his hands, could exempt himself from these summary proceedings by resigning his office.

The deputy as an officer of the court, stands on the same footing. He is compellable to answer to the court for abuse of its process, or other contempt of court, whilst acting as its officer. The proceeding by attachment does not affect him as an officer, but individually.—It is not against him in the character of one now acting in office, but to compel him to complete and carry out his official duties in doing something he had neglected and omitted, and because of malversation, whilst an officer, in retaining in his hands moneys received by him when in office, and by color of his office.

The law empowers the court to act directly upon the office of a deputy marshal, for misconduct in it, by removing him. (1 U. S. Statutes, 86, § 27.) This court had drawn an order, in execution of that power, removing this deputy from office, when informed of his resignation; but that mode of punishment would in no way affect the civil rights and remedies of suitors against him, for embezzling their moneys collected by him, nor the power of the court to inflict punishment by way of fine on him for such mal-conduct.

3. I cannot assent to the doctrine set up in the third point raised in behalf of the deputy, that this specie was merely cargo, which he is not bound to bring in court or deposit in bank.

The foreign coins mentioned in the depositions, comprising the large sum in question were all legal currency under our laws. They were money, the same as coin of the United States Mint.

By the laws of this State, the sheriff can levy on money or bank bills and must return and pay them as so much money collected. (2 R. S. 290. Allen on Sheriffs, 159.) The case of *Knowlton v. Bartlett*, 1 Pick. 271, was that of money levied on and embezzled by the deputy sheriff. The process in his hands was a *meane attachment*; the same in effect as the attachment and monition issued in this cause.

. There was no necessity for changing the character of the property taken. It was already money, and the officer was bound to pay it into court as such.

4. It is contended that this proceeding is not supported by the Act of Congress of 1817 as it demands the payment of the moneys into court, whilst the statute directs that they shall be deposited in an incorporated bank of the state to the credit of the court.

This is only a different phraseology for the same act and the same result. The purport and object of the motion is to place the moneys under control of the court for the protection of the parties litigant; and the order might be modified so as to conform to the language of the statute, if that were necessary.

The Act of Congress of April 18, 1814, (3 Laws U. S. 127,) directed the deposit of moneys paid into court, in an incorporated bank to be designated by the court.

The Act of 1817 appointed the branches of the U. S. Bank such

U. S. District Court.—The United States v. The Brig Lawrence.

depositories, still leaving it to the courts to designate state banks when no branch of the U. S. Bank was convenient.

Immediately on the termination of the charter of the U. S. Bank, this court designated incorporated banks in this city for that purpose. The Bank of the State of New-York, the Manhattan Bank and the Bank of New-York are the only ones appointed.

The 2d section of the act of 1817 requires the moneys to be deposited in the name and to the credit of the court. The marshal may, undoubtedly, if he elects so to do, proceed directly to the appointed bank and place money collected by him in deposit in that form, provided the bank will accept it from him.

But it is manifest that an orderly and accurate method of conducting this business and keeping the accounts so that all parties in interest can acquire the information they need in respect to deposits and so that the funds shall be emphatically in public keeping, is indispensable.

The courts in this district require, to that end, that the moneys be paid into court to be deposited by the clerks, under the title of the cause to which they appertain. The court, as such, keeps no bank account, and there is no general deposit of moneys to its credit. Every deposit is specific and special, to the credit of the cause out of which the money arises. No part of such money can be drawn out but by order of the court, entered on the minutes, signed by the judge, and then checked for by the clerk.

Those minutes and records are open to inspection by all persons in interest.

If then the money is, in the first instance, carried by the marshal to the bank, it will be necessary to re-deposit it under the order of the court, in the manner provided for keeping the accounts and for its safe and correct disbursement.

Upon the law of the case, I am clearly of opinion that the U. S. Attorney is entitled to compel Peck, the deputy, to pay the money in question into court, under penalty of attachment for contempt.

But there is undoubtedly a want of some formal step to entitle him to a peremptory order to that effect. No order has been served personally on Peck which he has disobeyed, and he is not, accordingly, put in a state of contumacy as yet before the court. Sufficient however is shown upon his own affidavit to satisfy the court that he was apprized of the proceedings, and to justify an order or an attachment against him to bring him before the court to answer.

It is accordingly directed, that the U. S. Attorney may take an order on Peck that he forthwith pay into court the moneys in question; or at his election he may have an attachment to bring Mr. Peck into court to answer interrogatories on the subject matter.

It is not made to appear upon the proofs submitted to me, that the marshal has personally been guilty of any delinquency. He is answerable for the acts of his deputy done "*colore officii*," (*The People v. Dunning*, 1 Wend. R. 16; *Clute v. Goodell*, 2 McLean, 193,) although without his knowledge or recognition; (*McIntyre v. Trumbull*,

N. Y. Court of Common Pleas.—Ketchum v. Williams.

7 Johns. R. 35; *Walden v. Davison*, 15 Wend. R. 575;) and in respect to moneys so collected or taken by the deputy, the party entitled to them, can have his remedy by process of attachment against the marshal personally. (*The People v. Brower*, 6 Cowen R. 41.)

There is some want of complete formality in this instance, as to the proofs necessary to found a motion for a peremptory attachment; and one for the purpose of bringing the marshal before the court to answer is unnecessary, as he presents his own affidavit and that of Mr. Thompson showing cause in excuse of himself.

The excusatory matter set up will not protect him against an attachment, unless it appears that Peck obtained possession of the money tortiously and in fraud of the marshal's rights. The Court cannot upon the statements laid before it, imply that Mr. Peck so acquired the money, and the marshal may be compelled to answer on interrogatories whether the late deputy had not adequate powers in this behalf, to take upon himself the possession and control of the money.

As the evidence of the preliminary steps, does not entitle the applicant now to a peremptory attachment; and as there does not appear to have been any personal delinquency on the part of the marshal, I shall direct that an order be entered for him to pay the money into court on or before the first day of May next, or that an attachment issue against him.

N. Y. Court of Common Pleas.

Before the Honorable M. ULSHOEFFER, First Judge, and Assistant Judges INGRAHAM and DALY.

HENRY F. KETCHUM v. JOHN WILLIAMS.
SAME v. SAME.

MOTION TO SET OFF JUDGMENTS.

Notice of assignment of judgment or cause of action personally to the debtor is essential to protect it in the hands of a *bona fide* assignee, against the off-set of a subsequent judgment between the same parties. The lien of the attorney for costs is not recognised on a motion to set off judgments.

THIS was a motion on behalf of the plaintiff to set off a judgment in his favor in debt for \$1600, \$56 05 damages and costs recovered in one suit against a judgment recovered by the defendant in replevin in the second suit, June 30th, 1848, for \$417 79.

The facts were briefly as follows: In April, 1846, Ketchum commenced a replevin suit for a pair of horses against Williams and took the property. Williams, the owner of the horses on the 22d of April, 1847, assigned all his right of recovery, &c., in the replevin suit to Thomas A. Cock, to whom he was indebted for the keep of the same horses. The defendant Williams got a verdict in the replevin suit on the 6th of May, 1847, and on the 7th of May, 1847, notice

N. Y. Court of Common Pleas—Ketchum v. Williams.

of the assignment and of the claim of the attorney of the defendant Williams was given to the attorney for Ketchum, the plaintiff, and on the 30th of June, 1848, Williams had final judgment against Ketchum, the plaintiff, in the replevin suit for \$417 79; the horses being valued at \$150, and the balance of the judgment being for costs.

On the 30th of March, 1847, the plaintiff Ketchum commenced the action of debt against the defendant Williams, and on the 7th of May, 1847, recovered final judgment against the defendant for \$1600 debt, and \$56 05 damages and costs upon which there was due \$942 07.

Ketchum gave Williams notice of motion to off-set the amount of the judgment in his favor in the one suit against the amount of the judgment against him in the other suit. Cock, the assignee, opposed. The motion was argued before his honor, Judge Ulshoeffer, no proof being offered of notice of the assignment of Williams' claim in the replevin suit to Cock, the claimant.

John R. Brady, for plaintiff.

A. L. Brown and Albert Mathews, for assignee.

ULSHOEFFER, J.—Motion to set-off judgments. Ketchum recovered a judgment against Williams 7th May, 1847, upon which there is due \$1034 56-100. Williams recovered a judgment against Ketchum 13th June, 1848, but the verdict was 6th May, 1847, \$417 79 Ketchum applies to set-off his judgment against the judgment of Williams.

The set-off is resisted,

1st. Because the claim of Williams against Ketchum was assigned to Cock, 22d April, 1847. \$150.

2d. Because the attorneys of Williams and Cock have a lien for their costs, \$287 79.

No notice appears to have been given of the assignment to Cock, nor of any claim as to the attorneys' charges.

The provisions of R. S., 1st edit., 354, § 18, do not apply to set-offs of judgment, but to suits in which notice of set-off must be given. § 19, 1 Hill, 222.

If Ketchum had a claim before this verdict which could have been set-off he would have used it for that purpose, if he had not, or if it could not be set-off in Williams' replevin suit, then he can only rely on the judgment, 7th May, 1847. On the other hand if Cock and the attorneys wished the assignment of a *chose in action* to be available, it could only be so from *notice thereof*. 1 Hill, 222. Granting that the assignment of a judgment would be good without notice. (4 Hill, 559,) the judgment was never assigned, nor was it obtained until after the 7th May, 1847, the assignment of a verdict obtained without notice is only available from the time of judgment perfected. (4 Hill, 562.)

It seems to me that if Cock or his attorneys wished to protect themselves under the assignment of 22d April, 1847, they were bound to

N. Y. Court of Common Pleas—Ketchum v. Williams.

give notice thereof, because, otherwise, the judgment of Ketchum of May, 1847, was obtained before he had any notice of assignment, or lien for costs. Gr. Pr. 62, 349.

In truth, however, the attorneys are not claimants in this case; Cock alone claims under the assignment of 22d April, 1847, for the whole recovery, although he is only to receive for himself the damages, \$150, as he admits the costs belong to the attorneys, but there was no assignment to the attorneys, nor did they notify Ketchum of their claim for costs. (13 *Wend.* 655.)

Brown and Mathews must look to their employers for their costs, and Cock must look to Williams for his demand, and the judgment of Williams for damages and costs must be subject to the set-off of the applicant, Ketchum's judgment against Williams.

It being afterwards ascertained that notice of the assignment had been given by the attorney for Williams to the attorney for Ketchum, and also of his, the attorney's, lien for cost, upon an application to his honor judge Ulshoeffer, an order was made for Ketchum to show cause why the motion should not be re-argued upon these new facts, together with those disclosed by the former papers. A rehearing was granted, and at the same time the motion was re-argued upon all the papers together and upon all the facts.

James T. Brady, for plaintiff.

A. L. Brown and Albert Mathews, for assignee.

The counsel for the assignee submitted the following points:

I. The right of set-off *did not exist* at the time of assignment, and even had there been no assignment *could not have arisen* until after judgment in the replevin suit. *Graves v. Woodbury*, 4 Hill, 561, 6 Cowen, 598; *Hackett v. Connelt*, 2 Edw. V. C. R., p. 71.

1. It could not be set-off in the replevin suit.

2. It could not be set-off on motion. *Garrick v. Jones*, 2 Dow. Prize Cas. 157.

3. It is not within the statute.

II. Here there was only a debt on one side, and a claim sounding in damages on the other, which when it became liquidated by the verdict and judgment so as to admit of set-off, belonged to another person. *Hackett v. Connelt*, 2 Edw. V. C. R., p. 77; 5 Mason's R. 206.

III. Notice of the assignment is only necessary to put the debtor on his guard against dealing with the assignor, &c.; he must show prejudice for want of it, otherwise it is unimportant. Here notice was given as in the case of *Hackett v. Connelt*, 2 Edw. V. C. R. p. 71. *Graves v. Woodbury*, 4 Hill, 563.

1. The notice to the attorney of the plaintiff Ketchum was sufficient notice to plaintiff for all the purposes notice was requisite.

IV. The assignee's claim is superior in equity. *Spencer v. Barber*, 5 Hill, 568.

V. The lien of the attorneys was alone a sufficient ground for de-

N. Y. Court of Common Pleas.—McCormick v. Kehoe.

nying the motion to off-set. *Bradt v. Coon*, 4 Cowen, 416; *Dunkin v. Vanderburgh*, 1 Paige, 622; *Gridley v. Garrison and Forman*, 4 Paige, 647.

DALY, J.—The motion will be re-heard; the ground upon which the application is put is sufficient; a motion may be re-heard where an application is first made for leave, and the defendant's notice embraces such an application.

It has frequently been held by this court that an assignment of the subject matter of a suit before judgment is no bar to a party's right of set-off who has obtained a judgment, unless he has received notice of the assignment, and the fact of notice has not been made out. Notice was served upon Ketchum's attorney, but that cannot be regarded as notice to Ketchum.

In matters connected with the conduct and management of the suit, perhaps notice to the attorney should be deemed notice to the principal, but this related to a right growing out of the judgment in which the plaintiff should not be affected without notice; he was not notified of the assignment either by Williams, by Cock or by his own attorney, and he is therefore entitled to set-off his judgment.

[*March Special Term.*]

Before the Honorable D. P. INGRAHAM.

THOMAS MCCORMICK *against* PETER KEHOE.

EXAMINATION UNDER CODE—WHAT PROPERTY OF DEFENDANT MAY BE APPLIED IN SATISFACTION OF JUDGMENT.

By the 249 and 252 sections of the Code, a judge has the power to order any property *due* to the debtor to be applied in satisfaction of the judgment. These sections, however, only apply to moneys actually due to the judgment debtor, and not to moneys to become due on a contingency, or on an executory contract not performed at the time of the examination.

Where, therefore, A. was examined as a witness as to certain moneys alleged to be due to defendant, and it appeared that A. had agreed to convey several lots of land to defendant upon his erecting certain buildings thereon, A. agreeing to make advances to defendant as the work progressed for the purpose of such erection; but that at the time of the examination nothing was *due* to defendant under the contract, and it also appeared that defendant before any further payment was due to him had assigned such payment and the contract to B. without notice of the proceedings, to secure advances made by B. to him.

Held:—That the plaintiff had no lien on such moneys.

AFTER judgment entered in this action, the plaintiff procured an order for the examination of John Q. Aymer as a witness, as to certain moneys alleged to be due and owing to the defendant, under § 249 of the Code of Procedure.

On his examination pursuant to this order the following facts appeared.

That Aymer had agreed to convey some lots of land to the defen-

dant Kehoe, upon his erecting certain buildings thereon, according to a written contract; Aymar further agreeing to make advances to Kehoe in instalments from time to time according to the progress of the work, for the purpose of such erection; that at the time of the examination nothing was due Kehoe under this contract, the instalment previously due having been paid to him, and the buildings not having sufficiently progressed, to entitle him to the next.

The defendant Kehoe did not appear on this examination, and on 3d February, 1849, an order was obtained restraining Aymar from making payment to the defendant of that portion of the moneys thereafter to become due under the contract, until further order of the court.

H. G. De Forest, for the defendant, moved to vacate this order on affidavits showing, in addition to the above facts, that the buildings had not sufficiently progressed to entitle Kehoe to the next payment under said contract, until the 12th day of March, and that before it was due Kehoe assigned it to William G. Cluve, who advanced monies to him with which he was enabled to proceed with the erection of the buildings.

McMahon, contra.

INGRAHAM, J. Judgment was recorded in this cause against the defendant, in January, 1849.

Mr. Aymar was examined, to ascertain if any thing was due by him to the defendant, and he testified there was nothing due, but that there was an unfinished contract for building houses, on which payments would become due when more work was performed. Upon this testimony an order was made, directing Mr. Aymar to retain out of such subsequent payment \$150. The defendant afterwards assigned this payment and the contract to Cluve, as security for advances which were necessary to finish the buildings, and Cluve, without notice of these proceedings, has advanced monies and claims these payments. A motion is now made to vacate the order. As between Mr. Aymar and the plaintiffs, I suppose the decision heretofore made is conclusive, but as neither Cluve nor the defendant had notice of these proceedings, they may move to vacate the order. If there had been any money due by Aymar to the defendant, at the time of the examination, or if there was any money coming due, and not depending on any contingency, the order would have been proper.

But when there was no payment to come due, until after more work and money had been expended under a contract, such anticipated payments have not been held liable to this proceeding, nor could they be enjoined for the payment of a debt previously due.

The Code does not reach this case. It allows the judge to order any property *due* to the debtor to be applied to the satisfaction of the judgment. Sects. 249, 252. These sections only apply to moneys due to the judgment debtor, and not to moneys to become due on executory contracts not performed at the time of the examination.

N. Y. Court of Common Pleas—Englishbee v. Helmuth and Jenkins.

It would be manifestly unjust to a person who had a contract with a judgment debtor, to enjoin money to become due on a contract, and thereby prevent the completion of the work.

If the contract is honestly assigned to obtain money to complete it, such subsequent payments should be applied to that purpose, in justice to the person for whom the work is to be performed.

The plaintiff has not, under this view of the case, any lien on this money, and the order should be vacated.

[*March Term, 1849.*]

Before the Honorable D. P. INGRAHAM and CHARLES P. DALY.

FRANCIS ENGLISHBEE V. SIMON HELMUTH and MARY H. JENKINS.

An act of the legislature, whether public or private, cannot be impeached in a court of law upon the ground that its passage was procured by means of fraudulent representations made to the legislature or by the concealment from that body of material facts.

An alien cannot acquire a title to real property by descent, or which is created by other mere operation of law, though an alien resident may purchase land or take it by devise, subject to the right of the state to divest him.

The peculiar interest which a purchaser acquires, before conveyance, in land sold under an execution, is not equivalent to seisin, and where a purchaser died before the expiration of the time within which the judgment debtor had the right to redeem, and the sheriff after the time for redemption had expired, conveyed to the administrators of the deceased purchaser for the benefit of heirs—*Held*, that such purchaser was not seised of the premises at the time of his death.

The nature of seisin commented on and explained.

The conveyance by the sheriff in such a case vests a mere naked estate in the administratrix, and if there be no heirs capable of inheriting at the time of such conveyance the title to the land passes instantly to the state.

Where the title to land fails from defect of heirs it escheats to the people, and will not vest absolutely in a trustee who holds for the benefit of heirs. The rule in *Burgess v. Wheat*, 1 Eden, 177, has never been recognised in this country.

But as the trustee takes the estate for the benefit of heirs, the right to hold it will be presumed before office found, as every one is presumed to have heirs until the contrary is shown. It is a presumption, however, which may be repelled.

Inquest of office or a recovery in ejectment, which is the substitute for it in this state, is not necessary to vest a title in the state, where there is a failure of heirs capable of inheriting.

As the title cannot remain in abeyance, it passes at once to the state by operation of law.

The state stands in the same relation as the king at common law, where the crown become entitled to an escheat upon the death of the king's tenant *in capite* without heirs, or where all badges of tenure were lost and the king took as the great or chief lord by escheat.

In what cases office found was necessary at common law to give the crown a title by escheat. The state does not take the land beneficially as heir, but by virtue of its right of sovereignty as the ultimate owner and proprietor of the soil. It does stand in the relation of a *cestui que trust*. From the want of an individual proprietor the land escheats to the people as forming part of the common stock to which the whole community is entitled.

The state has the right to make a grant of land, of which the owner died seised without heirs, before office found, the dictum of Sutherland, J., in *Jackson v. Adams*, 7 Wend. 367, to the contrary denied. The state cannot divest an alien who is in possession by purchase or devise, unless by an inquest of office but where a native or naturalized citizen dies without heirs the land passes at once to the state and the power to grant is incident to the legal title.

The statutes of the 8 Hen. 6, c. 16, and 18 Hen. 6, c. 6, restraining the power of the king to grant escheated land until office found were not designed to affect grants or gifts in fee simple or tail, and whether those statutes have any application to the law of real property as it exists at present in this state. *Quere*.

The grant by the state will not bar the heirs if there be any living, who were capable of inheriting when the owner died. The right of the state to grant may be inquired into

N. Y. Court of Common Pleas.—*Englishbee v. Helmuth and Jenkins.*

in action between the heir and the grantee, and the heir may recover until barred by an adverse possession of twenty years.

An act of the legislature authorizing the land commissioners to release the interest of the state in escheated land to any citizen or resident alien, in certain cases, is an act appropriating public property to private purposes and requires a two third vote. The enabling act of 29th of April, 1833, is such an act, and having been passed by a majority vote is unconstitutional and void.

Letters patent granted by the commissioners under this act, are void upon their face, and it is not necessary to proceed by *scire facias* or by bill in equity to set them aside. Where letters patent are granted without authority they are void upon their face, and may be disregarded at law.

An act of the legislature removing the disability of alienage and authorizing an heir to take hold and dispose of land the same as if he had been a citizen at the time of the death of the owner, will entitle such heir to take as by descent, where the land has escheated to the state for want of heirs capable of inheriting.

The rule that a party to take by descent must have been entitled to take when the descent was cast, does not apply to a case where there are no heirs capable of inheriting at the death of the last owner and the land has consequently escheated to the people. The state cannot by a special act authorize an alien of nearer kin to take to the exclusion of a citizen of kin more remote, as it would be divesting a title acquired by an heir under the general law of inheritance but where there are no heirs who can be affected, and the property is in or must come to the people, the legislature have the power to authorize a party to take as by descent or in any other manner.

Ejectment for certain premises in Duane-street, in this city, occupied by the defendant Helmuth, under a demise from the defendant Jenkins, who, as landlord, was let in to defend on her own application.

The premises were formerly owned by Robert McQueen, against whom an execution was issued in November, 1833, on which they were sold to James Englishbee.

James Englishbee died intestate, in August, 1834, leaving a widow named Mary, and no heirs capable of inheriting. The plaintiff, his half-brother, was an alien, but for which bar he would have been his heir at law.

Mary, the widow, took administration, and under the statute, (2 R. S. 296, sec. 63,) the sheriff, on the expiration of the time for redemption, conveyed the premises to her as administratrix.

In January, 1835, the widow presented a petition to the commissioners of the land office, pursuant to the act concerning escheats (Laws 1833, chap. 300,) for a release of the house 55 Duane street, with other premises, which was made to her by letters patent, issued under the direction of the land commissioners. A of

The defendant Jenkins made title to the premises under the Mary Englishbee, who died in December, 1845.

In 1841, the plaintiff came to this country to reside; affidavit declared his intention of becoming a citizen, and filed subsequently the fact in the office of the secretary of state, and legislature, by a admitted to citizenship. In November, 1847, then act releasing vote of two-thirds of all the members, passed for to the premises, to the plaintiff all the interest of the people of this state and actions which and vesting him "with all the powers, title, the passage of said act the people of this state possessed previous, giving him "to take, hold, to obtain possession thereof," and authorizer and with the like effect and dispose of the same, in the same manner

N. Y. Court of Common Pleas.—Englishbee v. Helmuth and Jenkins.

as if he and James Englishbee had, at the time of the death of the said James, been natural born citizens of this state."

In the month of December following, this suit was brought. The defendants offered on the trial to give evidence that the act of the legislature was procured by misrepresentations and suppression of material facts; the evidence was ruled out, and they made a bill of exceptions founded thereon. The jury then found a special verdict, embodying the foregoing facts, and praying the judgment of the court.

C. A. Rapallo and *Geo. Wood*, for the plaintiff.

Under the conveyance from the sheriff to Mary Englishbee, she, as a naked trustee, took no estate. The beneficial interest, and with it the legal estate, passed to the plaintiff, and he took *by purchase*, and *not by descent*. An alien may purchase lands, and hold them till office found. Here has been no office, and the interest of the state has been released to the plaintiff, thus making his title perfect.

If, however, the *cestui que trust* in the conveyance from the sheriff to the administratrix, be deemed to take by descent, and that by reason of the plaintiff's incapacity so to take, he acquired no title, then the title by that conveyance passed to the state, (1 R. S. 714, sec. 1,) and the state has, by the act of 1847, substituted the plaintiff to all its rights.

The release by the land commissioners to Mary Englishbee conveyed no title, because,

1st. That act only applies to lands which escheat *by reason of the death of the person last seised*, and James Englishbee, the deceased, never was seised of the premises. They did not, therefore, come within the purview of the act.

2d. The act concerning escheats, inasmuch as it authorizes the land commissioners to grant releases upon payment of a proportional part of the ascertained value of the land, was unconstitutional, as not having been passed by a two-third vote, and as seeking to delegate a discretion vested by the constitution in the legislature required to be exercised by it in every individual case.

T. J.

Fraudver and *C. O'Connor*, for the defendants.

been receives every grant, and the evidence offered should have

The conveyance

tute, vests the land by the sheriff to an administratrix, under the statute, *purchase*. The plaintiff being incapable of taking by descent, took nothing by the conveyance to Mary Englishbee. There being no *cestui que trust*, she consequently held the lands discharged of the trust. If the effect of the sheriff's deed was to vest the lands in the state, the letters patent issued by the land commissioners conveyed them effectually to Mary Englishbee.

The letters patent cannot be impeached in this action. They must be set aside either in chancery or by *scire facias*. They are, how-

N. Y. Court of Common Pleas.—Englishbee v. Helmuth and Jenkins.

ever, perfectly valid. James Englishbee had an *equitable seisin* within the meaning and intent of the act concerning escheats, which should be liberally construed, and is constitutional and valid.

By the Court. DALY, J.—There is no foundation for the bill of exceptions. An act of the legislature, whether public or private, cannot be impeached in a court of law, upon the ground that it was procured by means of fraudulent representations made to the legislature, or by the concealment from that body of material facts. If there was authority to enact it, and it has gone through the necessary forms of legislation, it is binding upon courts of justice, and they must respect and carry out its provisions. If improvidently passed, the remedy is by an application to the legislature for its repeal.

By the sheriff's deed, the administratrix took a naked estate in the premises, which, upon the failure of heirs, escheated to the state. Where the title to land fails, from defect of heirs, it vests and escheats to the people, in whom the original and ultimate property is vested. (2 R. S. 1, § 2, 3d ed.) It would not vest in the administratrix upon the failure of heirs, for the rule in *Burgess v. Wheate*, (1 Eden, 177,) that the estate vests absolutely in the trustee, upon the failure of a *cestui que trust*, has never been recognised in this country. (10 Gill and John. 443; 3 Leigh. 518; 2 R. S. 2.) But, as she took the legal estate in trust for heirs, her right to hold it would be presumed until office found, as every man is supposed to have heirs until the contrary is shown. (7 Wend. 367.) The contrary, however, appears in this case, and takes away the presumption, for it is found by the special verdict, that James Englishbee had no children, and that he left no heirs who were citizens of the United States. As there were no heirs, therefore, who could, when the sheriff conveyed to the administratrix, take beneficially, the title to the land passed, by operation of law, to the state. (Comyn, Dig. Prerogative, D. 70; 4 Kent, 424.)

Francis Englishbee, being an alien, could not take as heir, (unless by the enabling operation of the act of 1847,) for an alien cannot acquire a title to real property by descent, or which is created by other mere operation of law; nor could the plaintiff take by purchase. If he had been a citizen when the sheriff conveyed to the administratrix, he must have taken by descent. Title to land, when distinguished from title by escheat, or forfeiture, is derived by descent or purchase. In the former case, by operation of law; in the latter, by the act or agreement of the party. He could not, therefore, take as purchaser. An alien resident may purchase land, or take it by devise, and hold as against every one but the state, subject to the right of the state to divest him. But the plaintiff acquired no right by purchase or devise. He could only take by descent, as the heir of his brother; and from which he was barred by his alienage.

Mary Englishbee acquired no title under the patent. We are not precluded from inquiring, whether the commissioners had any autho-

N. Y. Court of Common Pleas.—*Englishbee v. Helmuth and Jenkins.*

city to issue it, or rather, whether they had any authority to release the land. A patent is to be avoided by *scire facias*, where it has been obtained by means of some fraudulent suggestion, or by the concealment of a material fact; or where it has issued by mistake, or in ignorance of some material fact. In such cases, the writ of *scire facias* is the appropriate, and perhaps the only, remedy. (2 R. S. 673.) But if it is void upon its face, or has been granted without authority, it may be disregarded, as matter of law. (10 Johns. 23; 6 Con. 281.) The patent here was void upon its face. The act of the 29th of April, 1833, under which it issued, was an act appropriating public property to private purposes, and did not receive a two-third vote. (Const. of 1821, art. 7, sec. 9.) It is not so certified by the presiding officer of each house, (1 R. S. 162, § 3,) and a release of escheated lands under it, is therefore void. The act delegates to the commissioners the right of appropriating public property to private purposes, a power which the legislature cannot exercise or confer without a two-third vote. It authorizes them to release to any citizen or resident alien, the interest of the state in any land, of which the owner died seised, without making a devise, and leaving no heir capable of inheriting. The ultimate property in all lands within the state, is in the people, in virtue of their right of sovereignty, and the title to it, upon defect of heirs, vests at once in the state. (2 R. S. 2, § 1.) Where an owner of land dies seised, without heirs capable of inheriting, or where an alien dies, who has purchased land, or taken it by devise, the land instantly, and of necessity, without office found, vests in the state, for the freehold cannot be kept in abeyance. (3 Johns. Cases, 113; 4 Kent, 424; 2 Id. 54.) The title of the state being absolute, the land is, of course, public property, and cannot be appropriated or given to individuals for their private use and benefit, without a two-third vote. It is undoubtedly competent for the legislature, by a majority vote, to abolish escheats, or pass a law regulating the succession to real property. But this is not a law of that nature. It is not an act abolishing escheats or declaring that a particular class of persons may inherit, who were before under disability, or giving up the right of the state to all land which had escheated or might thereafter escheat; but an act authorizing the release of a certain description of escheated land to private persons, which is an appropriation of public property to private purposes. The reservation by the state of a certain per centage upon the value of the property given up, does not change it from an appropriation into a contract of sale. There is no consideration. The state receives no equivalent. The party obtaining the land gives up nothing, nor incurs nor assumes any obligation in consequence. The per centage is deducted from the value of the land, and is not a consideration paid by the party to the state. It is a gift or appropriation, and nothing else. As the premises in question escheated after the passage of the act, it has been urged that, though it might be void as respects land which had escheated before its passage, it would be good as to land which should escheat

N. Y. Court of Common Pleas.—*Englishbee v. Helmwuth and Jenkins.*

thereafter. But I think an act appropriating to private purposes public property which the state might acquire thereafter, is as fully within the constitutional provision as an act appropriating property actually in possession. To anticipate the future acquisitions of the state, is as objectionable as to vote away what it has already in possession. By such prospective legislation, it would be possible to evade, in a very great degree, the salutary restriction intended to be imposed by the two-third vote.

But, if the act were constitutional, the commissioners had no authority under it to release this particular piece of property. They are restricted to cases where the owner dies seised of lands, without making a devise, and leaving no heirs capable of inheriting; and James Englishbee was never seised of the premises in question. Seisin anciently denoted the possession of an estate not less than a freehold, and the word in its present signification indicates the possession, or an absolute right to the possession, of such an estate. There is seisin in fact, and seisin in law. In fact, when the party is in possession. In law, where he has the right, as in case of descent, to the possession. So there may be equitable seisin, as in conveyances in trust. The trustee is seised at law, and has the legal estate, and the *cestui que trust* is deemed seised in equity. (1 Cruise, 406, § 3.) Seisin, in either of these cases, would be sufficient for the purposes of this statute. But the peculiar interest which James Englishbee acquired as purchaser, at the sheriff's sale, was not of such a character as to render him seised of the land, in any sense in which that term has heretofore been employed. He was not in possession, nor had he an absolute right to the possession. It was contingent and not absolute. His right to a conveyance might be defeated by redemption at any time within the fifteen months. In the case of equitable seisin, the possession is postponed until the termination of the trust estate, but the right to it is not the less fixed and absolute. But in Englishbee's case it was wholly uncertain. That he should become entitled to a conveyance, depended upon contingencies, the happening of which were unknown and unascertainable at the time of his death. It was a mere legal possibility, an interest altogether too uncertain to constitute seisin. It is evident, moreover, upon reference to the statute regulating the sale of real property upon execution, that the legislature did not intend that the peculiar interest which they created in the purchase before conveyance, should be equivalent to seisin. By the § 63, the right and title of the judgment debtor is not divested until the expiration of the fifteen months: he is, therefore, the party seised, and not the purchaser. After conveyance, the sheriff's grantee is vested with the legal estate from the time of sale, to enable him to bring waste, which would constitute seisin; but the grantee here is the administratrix. She, for that purpose, may be deemed seised from the time of sale, but not the purchaser. By the § 66 it is provided that the real estate, after conveyance to the representatives of a deceased purchaser, may be sold for the payment of his debts, in the same manner as lands whereof he died seised. Now, if the

N. Y. Court of Common Pleas.—*Englishbee v. Helmuth and Jenkins.*

framers of the statute had designed that the purchaser should be seised before conveyance, or that the conveyance of the sheriff should have a retroactive effect, so as to render the purchaser seised from the time of sale, this special provision was unnecessary; the land might be sold under the general provision, (2 R. S. 166, sec. 22,) which authorizes the surrogate to order the sale of any lands for the payment of debts, of which a testator or intestate may have died seised.

The plaintiff has acquired an absolute title by the act of 1847. It releases to him all the right, title and interest of the state in the premises; it invests him with all the power, title, rights and actions which the state possessed before the passage of the act, to obtain possession of the land and authorizes him to take hold and dispose of it, the same as if he had been a citizen at the time of his brother's death. The right of the state to grant land, of which the owner died seised, without heirs, before office found, is denied by Sutherland, J., (in *Jackson v. Adams*, 7 Wend. 367.) He says, "if any natural born citizen dies without heirs, his lands escheat, but the state has no right to enter and take possession until office found, and any grant which they may make of such lands, by patent or otherwise, can convey no title, because, until office found, the state had no title, as every man is presumed to have heirs until the contrary is shown." But he refers to no authority, and I take the law to be otherwise. The state cannot divest an alien who is in possession by purchase or devise, unless by inquest of office, or by judgment in ejectment, which is our substitute for it. But where a native or naturalized citizen dies without heirs, the descent is cast upon the state. (*Staunford's Prerogativa Regis*, 54, a. *Willion v. Berkley*, Plowd. 229. *Comyn's Digest Prerogative*, D. 70. *Vin. Ab. Office*, D. 15;) and the power to grant is incident to the legal title. At common law, office was necessary where the king entered for a forfeiture, (Plowd. 229,) or upon condition broken, (Id. 213,) or upon attainder for treason or felony, (Brooke, *Devant Escheator*, 38,) or upon lands purchased by the king's villien, (Fitzh. *Vilienge*, 22,) or held by an alien, (16 *Vin. Ab.* 79,) or by a corporation in mortmain, (Br. *Prerog.* 113, a,) or in wardship, (Br. *Devant Escheator*, 55,) or by alienation without license, (Brooks *Traverse de office*, 22.) But where his tenant *in capite* died leaving no heirs, the inheritance passed to the king without office, the reason for which is very clearly stated in *William v. Berkley*, Plowd. 229. In that case the question arose upon an exception to a replication setting forth that the Marquis Berkley, who held immediately from the king, died without heirs, whereby the king became entitled, &c. To this it was excepted that the replication contained no allegation of any office found, proving that the marquis died without heirs of his body, which ought to have been done; and it was argued that his death without heirs was matter of fact, and without his death the king had no title to entry. That there ought to be matter of record to prove the matter of fact, which gives a title to entry in the king. But the whole court were against the exception, and it was said that the freehold must of necessity be in

N. Y. Court of Common Pleas.—*Englishbee v. Helmuth and Jenkins.*

some one, for which reason it should not be in suspense, and therefore, when the estate was determined in the marquis, the law cast the possession upon the king. As the freehold is in him before office, it is idle to have an office to convey that to the king which the law has conveyed to him. Under the feudal tenures, the land, upon the failure of heirs, escheated to the mesne lord or to the king; and as the lands were generally held of mesne lords, instances of escheat to the king were rare, except of his immediate tenant *in capite*. This distinction remained after the act of 12 C., 2 C. 24, changing the ancient tenures into free and common socage; for as that act preserved the rent and services to the lord, the land was still held of him, and he was entitled upon the failure of heirs to the escheat. But where all badges of tenure had been neglected to be preserved, and it could no longer be known of whom the lands were mediately held, then the king, as the great and chief lord, had them by escheat, for to him fealty belonged, and of him they were held by presumption of law, and without the necessity of proof. (Boothe, 135; Cr. Eliz. 120; 3 Cruise Dig. 496; Coke Lit. 194, 13, a, note 1.) There being no tenures in this state, the state, with us, as the ultimate owner and proprietor of land, stands in the same relation as the king at common law, and is entitled to the land without office, upon the death of an owner without heirs. But I have shown by the authority from Plowden, that that was deemed unnecessary to give title to the king. It was doubted in *Doe d. of Rex., and Haynes v. Redfern*, 12 (East, 96,) whether the right and possession must be presumed to be immediately in the crown without office, upon the death of the tenant last seised, as if he were the king's immediate tenant, where the king's title did not appear by any matter of record. The point was not passed upon, and was but loosely considered. Lord Ellenborough thought the case was distinguishable from that of the king's tenant *in capite* in which the tenure was of record, and by which the king's title appeared; but where the tenure was not of record, it was wholly uncertain under whom, or by what tenure the tenant held. He appears to have thought, that inquest of office was necessary in such a case, that the tenure might be ascertained, and made matter of record, before it could be presumed that the estate was in the king; and perhaps there was some reason for this distinction, for it was a part of the law of tenures that the king could not take or grant, except by matter of record. (Doctor and Student, ch. 8; 2 Coke, Plowd.) But tenures have ceased to exist in this country. We have abolished them in this state, with all their incidents. The reason, therefore, which induced Lord Ellenborough to think office necessary, is of no application with us. The right of the king to grant escheated land was restrained by the statutes of 8 Hen. 6, c. 16, and 18 Hen. 6, c. 6, until inquest of office was returned into the chancery or exchequer. But these statutes are limited to grants or leases to farm, made by the chancellor, treasurer, or other of the king's officers, and not to grants or gifts in the fee simple or tail. (Dyer, 146, a.) They did not apply to cases where the king was entitled to possession without

N. Y. Court of Common Pleas.—*Englishbee v. Helmuth and Jenkins.*

office, as upon the death of his tenant *in capite* without heirs, (12 East, 101;) and I think they have no application, for any purpose, to the law of real property, as it exists at present in this state. If the legal title is complete in the state without office, the power to grant, as I have before remarked, is incident to it. Where the crown acquired title, without office, its right to grant was undoubted. The state is invested with the same power which the crown possessed, and the grant to the plaintiff, under this act, is good. A grant by the state does not bar heirs, if there be any living who are capable of inheriting, when the owner dies. Its right to grant can be inquired into, in an action between the heir and grantee. A conveyance by the state, however, after judgment in ejectment, would bar the heir, unless he instituted an action within five years from the docketing of the judgment, (1 R. S. 324, § 4,) while if no proceeding be taken by the state, he can recover against the grantee, until barred by an adverse possession of twenty years.

This act removes the disability of alienage under which the plaintiff labored, and authorizes him to take, hold, and dispose of the land, the same as if he had been a citizen at the time of his brother's death. This presents the question whether the state has the power to authorize the plaintiff to take as by descent. To enable a party to take by descent, he must have been entitled when the descent was cast, for if not then entitled, the estate passes to the next person having inheritable blood. But if no such person exists, and the land is in, or must go to the people, I see no objection to the legislature removing the disability of an alien heir, and authorizing him to take as by descent. The state could not, by a special act, authorize an alien of nearer kin to take, to the exclusion of a citizen of kin more remote, for it would be divesting an heir who had acquired a title under the general law of inheritance. But where there are no heirs who can be affected, and the property is in, or must come to the people, the legislature should have the power to authorize a party to take as by descent, or in any other manner. (1 Johns. C. 401; 10 Wend. 9, 12; Id. 342.) If this view be correct, then, though the legal estate remained in the administratrix, the plaintiff would be entitled to take as heir or *cestui que trust*, by the enabling operation of this statute, and having a legal estate equal to his beneficial interest, coupled with a right to the immediate possession, he could maintain this action, (2 R. S. 12, § 47; 4 Denio.) The estate, however, did not continue in the administratrix, she could hold the land but in trust for heirs, and as there were no heirs, I can come to no other conclusion but that it instantly vested in the state. There was no trust to execute. It is essential to the existence of a trust, that there should be a *cestui que trust*. No trust was created by the sheriff's conveyance, for there was no heir who could take beneficially. The state cannot stand in the relation of a *cestui que trust*, for it does not take beneficially as heir, but if at all, in virtue of its right of sovereignty, as the ultimate owner and proprietor of the soil. From the want of an individual proprietor, the land escheats

In Chancery.—May v. Skey.

to the people, as forming part of the common stock to which the whole community is entitled. If it is not necessary to institute a preliminary inquiry, in the nature of an inquest of office, to ascertain if there be heirs, but the state becomes possessed from the fact of the defect, then its title was complete, and it had the right to make an absolute grant to the plaintiff. This act has been carefully framed with the view of transferring to the plaintiff every right which the state had at any time in the premises. It is comprehensive as language can make it, and I think his title under it must prevail.

INGRAHAM, J., dissented from so much of the opinion of Judge Daly as declares the act of 29th April, 1833, unconstitutional—but held that under that act Thomas Englishbee was not seised of the premises in question—in the other conclusion arrived at by Judge Daly, he concurred.

Judgment for plaintiff.

SELECT CASES FROM RECENT ENGLISH DECISIONS.

In Chancery.

Before the Vice-Chancellor of England.

MAY V. SKEY,—21st April, 1849.

HUSBAND AND WIFE—MONEY LENT—JURISDICTION.

Letters and a power of attorney from a husband to a wife, do not constitute such a lien for money supplied to her, not being for necessities, nor to pay creditors, as to give a court of equity jurisdiction to interfere; a demurrer for want of equity to a bill to recover such an advance, was, therefore, allowed.

THIS was a bill filed to recover a sum of 400*l.* lent to the wife of the defendant, who was absent in Tahiti. It appeared that the defendant had become entitled to an estate which had sold for upwards of 4000*l.* and had written several times to his wife expressing his affection, and fearing lest she should want the means of support. He had, therefore, requested his brother to give her the money she wanted, and likewise gave a power of attorney to one Dunnett, empowering him to receive the rents and give his wife 200*l.* This power was not acted upon, the tenants having refused to pay the defendant Dunnett, on the ground that the defendant might be dead. The plaintiff, therefore, lent 400*l.* at different times and in various sums, but as the wife had not incurred the debt for necessities, the plaintiff could not recover at law. She, therefore, filed this bill, relying on the letters, and power of attorney on the faith of which she alleged the money was lent.

Bacon and *Bilton*, in support of a demurrer for want of equity,

In Chancery.—*Lucas v. James.*

Bethell and *Wilcock*, in support of the bill cited *Earle v. Peale*, 1 Salk. 387; *Darby v. Boucher*, 1 Salk. 279; and *Harris v. Lee*, 1 P. Wms. 482.

The VICE-CHANCELLOR said, that the question was not whether there was a debt, but whether the court had jurisdiction to interfere. The cases cited at the bar were advances for payment of debts and the court had only to consider whether the persons were creditors, and in interfering to execute the trust, acquired jurisdiction. The plaintiff, however, as a mere creditor of the husband, had no equity against him as possessing a lien, for the power of attorney and letters did not constitute a lien and the court had therefore no jurisdiction to interfere.

Demurrer allowed.

Before Vice-Chancellor WIGRAM.

LUCAS v. JAMES.—18th April, 1849.

PRINCIPAL AND AGENT.

Where the clerk of a house-agent signed a qualified agreement for a lease of a house, but there was no evidence of his authority:—*Held*, that the court could not enforce it.

THIS suit was instituted for the specific performance of an alleged agreement made in September, 1847, by which the defendant agreed to lease a house in Curzon-street, Mayfair, for a term of 21 years, at 180*l.* a year. It appeared that the agreement was entered into with the house agent appointed to let the property and was in these words: "I agree to these terms, subject to the above observation." This was written in pencil and signed. The observation referred to, and which was also written in pencil, was the following:—"I have no objection to this agreement supposing there is nothing unusual in Sir Richard Sutton's lease." For the defendant it was contended that the signature being affixed in pencil, the agreement could only be considered as deliberative and conditional on the original lease, containing no provision of an unusual character, and that such lease did contain such provisions, and in particular a proviso of re-entry on non-payment of rent, whether it were demanded or not.

Wood and *Glasse*, for the plaintiff.

The Solicitor General, *Lloyd* and *Elmsley*, for the defendant.

WIGRAM, VICE-CHANCELLOR, after stating the agreement entered into with the clerk of the house agent, said that the plaintiff had not proved that such clerk was authorized to make this qualified agree-

Court of Queen's Bench.—*Brown v. Andrew.*

ment. The plaintiff might, therefore, after it was so signed by the defendant, have refused to fulfil it; and as this was the case, neither could the defendant be held to be bound by the agreement. The agreement must, therefore, be treated as a proposal, and as it was not followed up by any contract it could not be enforced.

The other points it was unnecessary to decide.

Court of Queen's Bench.

Before the four Judges.

BROWN v. ANDREW.—*26th January, 1849.*

LIABILITY OF PROVISIONAL DIRECTOR—CONTRACT BY PART OF MANAGING COMMITTEE.

Where a provisional committee-man authorized eight persons to act on his behalf as a managing committee:—*Held*, that he was not bound by a contract entered into by a smaller number.

IN an action by a traffic maker against a member of the provisional committee of a projected railway company, it appeared that the defendant attended a meeting at which a managing committee consisting of eight persons were appointed, with directions to take the most energetic measures for carrying out the project. On the day following this meeting, six of the eight persons so nominated as a managing committee, engaged with the plaintiff to take the traffic. In answer to the action it was contended that the authority given by the defendant was not pursued. The defendant had authorized a committee consisting of eight persons to contract for him, whilst the contract made with the plaintiff was entered into by six persons only. On the other hand it was insisted that a reasonable construction should be put upon the resolution to which the defendant was a party, and that it never could have been contemplated that all the members of the managing committee should be present whenever any contract was entered into. The plaintiff had a verdict, with leave to substitute a verdict, for the defendant, if the court should be of opinion that the concurrence of all the members of the managing committee was necessary to entitle the plaintiff to recover as against the defendant.

A rule was accordingly granted.

Chambers and Bramwell, for plaintiff.

Shee, Sergt., for defendant.

PER CURIAM.—The rule to enter the verdict for the defendant must be made absolute. The defendant has given a special authority to

Common Pleas.—*Sainter v. Ferguson.*

eight persons to act for him, and though it is probable that he understood a smaller number than eight would act in the matter, the court cannot, in the absence of all evidence upon that point, say that he has given them such authority. It has been said that it must be understood the defendant had authorized a reasonable number of the committee to act for him; the court, however, cannot fix upon the number which ought to be considered reasonable, but it was for the plaintiff to have shown that by evidence.

Rule absolute to enter the verdict for defendant.

Common Pleas.

SAINTER V. FERGUSON.—18th April, 1849.

SURGEON—RESTRAINT OF PRACTICE—LIQUIDATED DAMAGES.

A covenant not to practice as surgeon and apothecary within seven miles will be enforced, although the employment of the defendant as an assistant had ceased: and the penalty must be paid as liquidated damages.

THE plaintiff, a surgeon at Macclesfield, had entered into an agreement with the defendant whereby it was agreed, that in consideration of the plaintiff engaging the defendant as an assistant to help him as a surgeon and apothecary, the defendant would not at any time practice in his own name, or in the names of any other persons, in Macclesfield, or within seven miles thereof, under a penalty of 500*l.*; and the plaintiff also agreed to engage the defendant as assistant to him as a surgeon and apothecary, on these terms. An action was brought for a breach of this agreement, and on the trial at the Chester assizes, before Mr. Justice Creswell, a verdict was found for the plaintiff, damages 500*l.*

An application was now made for a rule nisi to set aside the verdict and enter a nonsuit, or for a new trial, or that judgment should be arrested.

Channell, Sergt., in support of the application, contended, that the contract only restrained the defendant from practising during the time the plaintiff actually employed him, and that it was void as in restraint of trade and for want of mutuality. (*Mitchell v. Reynolds*, 1 Smith's Leading Cases, 182, n.; and for want of consideration, *Young v. Timmins*, 1 Crompt. and Jer. 331; 1 Tyrwh. 226, and *Pilkington v. Scott*, 15 M. & W. 657.)

THE COURT said, that the agreement was only to take effect upon the engagement being entered into, and the plaintiff thereby authenticated the competency of the defendant as a surgeon and apothecary, which would be an advantage to the defendant, and the court would not enter into the adequacy of the consideration to the plaintiff that

Common Pleas.—Crosfield v. Morison.

the defendant would not practise within seven miles of Macclesfield. That agreement extended to any future time when the defendant might not be the plaintiff's assistant. If the defendant was not engaged by the plaintiff after this agreement, he was clearly not bound by it. But the declaration averred that he was engaged, and it must be assumed the terms were satisfactory to both parties. It was reasonable that the plaintiff should seek to protect himself from competition, and hence the agreement not to practise. The damages were not a penalty, but liquidated damages agreed upon, as an adequate security to protect the plaintiff from a breach of the contract. The rule would, therefore, be made absolute.

FRANCIS v. WEBB.—16th April, 1849.

ATTORNEYS CLAIM FOR COSTS—PAUPER.

Where plaintiff and defendant settle an action without paying the plaintiff's attorney's costs, but without any collusion to defraud the attorney, the court would not allow the attorney to proceed in the action for his costs.

THE plaintiff, a builder, had done work for the defendant, who had a counter claim against him, and not agreeing as to the settlement, brought an action to recover the balance, suing *in forma pauperis*. The case was referred to arbitration, but no award being made, it was proceeded with, and set down for trial. Before trial, however, the action was settled without consulting the attorney, the defendant paying the plaintiff 100l. The costs not being paid, the attorney proceeded with the action. A rule *nisi*, to stay proceedings, having been obtained,

Parry and *Metcalf* showed cause against the rule.

Byles, Sergt., and *Archbold*, supported it.

PER CURIAM.—No collusion to defraud the attorney has been proved to exist between the plaintiff and the defendant, and the defendant is not bound in such a case as the present to see that the attorney is paid his costs. In an action in *forma pauperis*, the court will always see that the attorney is not defrauded by any improper collusion. The rule, therefore, must be made absolute.

CROSFIELD v. MORISON.—12th February, 1849.

SUB-LEASE—COVENANT TO INDEMNIFY AGAINST BREACHES.

A covenant in a sub-lease to indemnify the sub-lessor against the breach of covenants in the original lease, held to be unqualified, and not restricted by non-occupation.

THE declaration in an action of covenant alleged that plaintiff, as original lessee of a colliery, remained liable to pay the rents and observe

New Rule in the Superior Court.

the covenants contained in the lease; that the plaintiff, by an indenture dated 1st January, 1840, in consideration of 1,575*l.* to be paid by the defendant, assigned the colliery to one John Reed, in trust for defendant. In case, however, of default in paying said sum at the time fixed, Reed was to sell and dispose of the colliery on certain other trusts. The defendant covenanted to pay the rents, &c., and to indemnify the plaintiff from all breach of covenants contained in the original lease. Various sums of money became due for the rent, and the plaintiff was, in consequence, obliged to pay the same to the reversioner. Several pleas were pleaded, and the issues on all were found for the plaintiff, with the exception of the third plea, which alleged that the defendant was not in possession of the colliery when the rents became due and were paid by the plaintiff, and which was entered for the defendant; and the question was, whether this plea furnished a good answer to the action. A rule had been obtained, calling on the defendant to show cause why judgment should not be entered *non obstante veredicto*. It was contended, that the defendant was only to pay rent while he was in possession, and that the covenant to indemnify was also similarly restricted.

PER CURIAM.—Having reference to the intention of the parties, as shown by the general terms used, the covenant to indemnify is unqualified, and the rule must, therefore, be made absolute.

NEW RULE IN THE SUPERIOR COURT, MADE 26th MAY, 1849.

From and after the *first Monday of September next*, no calendar cause will be heard at a general term, except on printed cases and points furnished to the court.

After the next *July term*, the party whose duty it is to make up the case, or who shall have elected to make it up, shall, eight days prior to the general term for which the cause is first noticed, serve on the attorney or counsel of the adverse party, three copies of the printed case for the use of such party. At the commencement of the argument, he shall furnish to the clerk of the court, ten copies of the printed case; and each party shall at the same time furnish to the clerk, ten printed copies, and to the counsel of the adverse party, three printed copies, of the points on which he intends to rely, with a reference to the authorities which he proposes to cite in their support.

All cases, points, and other papers, which may be delivered to the court in calendar causes, shall be printed on *white writing paper*, in royal octavo size, with every fifth line of each page numbered, and with a margin not less than one and a half inches wide. The printed matter shall be seven inches long by three and a half inches wide, properly divided into appropriate paragraphs; and the nature and character of each pleading and proceeding shall be designated by a short note in the margin, opposite the commencement of the same.

Of the copies furnished to the clerk, he shall deliver one to each of the justices and one to the reporter of the court, one to the State Library, and one to the New-York Law Institute; and he shall keep one copy with the records of the court.

THE
New-York Legal Observer.

VOL. VII.]

NEW-YORK, JULY, 1849.

[MONTHLY PART.]

CONSTRUCTION.

No. II.

DEEDS.

THE construction of deeds next claims our attention.

In construing deeds, the first thing we are to look for is the intention of the parties. This is to be gathered from the instrument itself, and if reconcilable with the rules of law, is to govern.* If the intent be clearly expressed by the terms of the instrument, no extraneous facts or circumstances are admissible to explain it.† This intent is to be gathered from the whole language used, though there may be a want of accuracy, or even a repugnance, between different clauses.‡ If the intent cannot be clearly gathered from the instrument itself, the court will take into consideration the circumstances attending the transaction, and the particular situation of the parties, the state of the country, and the things granted at the time.§ They will endeavor to avoid what is unequal, unreasonable, and improbable, if this can be done consistently with the words of the contract;|| so that if a particular construction would lead to such a result as no prudent man could have contemplated, and an opposite interpretation may be adopted without doing violence to the terms of the contract, the latter will be preferred.¶ It has even been held in a recent case, that, although the deed recites that the grantor has granted, bargained and sold a tract of land, the title will not pass, if, from the whole instrument, and a contemporaneous agreement executed by the parties, it is evident that a *title bond* was intended by the parties, and not a conveyance of the land *in presenti*.**

To carry the intent of the parties into effect, the court will construe the instrument as freely as the rules of law will permit. Thus,

* *Bryan v. Bradley*, 16 Conn. 474.

† *Means v. Presth*, 3 Watts & Serg. 803; 2 B. & Ald. 625.

‡ *Jameson v. Bal*, 7 Shep. 425.

§ *Adams v. Frothingham*, 3 Mass. 352.

¶ *Hassell v. Long*, 2 M. & S. 363.

|| *Royalton v. R. & W. T. Co.*, 14 Vern. 311.

** *Chepman v. Hassell*, xiii. Ala. 50.

Construction.

in a case where a husband had made a deed of land to a third person for the use of his wife, which in strictness was void, it was held to be a deed in trust, and so supported.* So, if a grant be made to one, or his heirs, the word *or* will be construed *and*, if necessary to carry into effect the intent of the parties.† Under the same circumstances and for the same reason, *and* will be construed *or*, as where a man covenanted with his lessee to make him *and* his assigns a lease for another term, the lessee having died, the lessor was held to have meant *or* his assigns.‡ So, we find it laid down in the old books, that by the grant of a remainder, a reversion may follow *and e converso*. So, too, if the intent be apparent, if part of the description in a deed prove inconsistent on being applied to the premises, it does not vitiate the deed, but may be rejected.§ If upon the face of the instrument there appears a particular intent and a general intent, at variance with each other, the particular intent must govern.|| But where the intent cannot be discovered, the deed is void.

Bad grammar will not destroy a deed, and evident omissions and mistakes will be supplied. It has even been held that where the grammatical sense is plain, it will not be adhered to, if a contrary intent is apparent.¶

But in giving this liberal construction to a deed in order to carry out the intent of the parties, there is one rule to which courts are always bound. Where the operative words are such as to be capable of only one meaning, and contain in themselves a full, perfect and unambiguous description of a character to resort to and act upon, the intent of the grantor collected from the other parts of the deed, is inadmissible. But a limitation open to two constructions can only be construed with reference to other parts, and the meaning collected from the whole instrument. Legal presumptions commonly prevail in the absence of any proof of practical intent, but not where that is clear and express. And when the meaning is clear and the words will admit of an interpretation conformable to it, the court is not bound to adopt the technical sense in opposition to the actual meaning of the party.**

Hitherto we have spoken of the intent of the parties to be derived from the instrument itself. We now come to the difficult question of the admission of parol evidence to prove the intent. We do not purpose to go fully into this subject. To do so would require a treatise. We shall merely give the general rule upon this point and notice a few exceptions.

The general rule is, that parol evidence will not be admitted to contradict, vary, or add to a written instrument, but may be admitted to support or to explain it with respect to collateral matters.††

But to this rule the exceptions are numerous. Parol evidence is always admissible to establish fraud,‡‡ on the ground that if there was

* *Chamberlain v. Crane*, 1 N. H. 64.

† *White v. Crawford*, 10 Mass. 183; 16 East. 67.

‡ *Davies v. Prentice*, 16 Pick. 435.

** *Goodlittle dem. Howell v. Gibbs*, 4 B. & Cr. 709.

†† *Rez v. Inhab. of London*, 8 T. R. 379.

‡ *Flowd.* 298.

§ *Hull v. Foster*, 7 Vern. 100.

¶ *Jackson v. Tapping*, 1 Wend. 388.

‡‡ 2 Wils. 347.

Construction.

fraud, the deed never had any being at all, and therefore the rule that a deed can only be defeated by a deed, does not apply. So parol evidence is admissible to show the nature of the transaction and the objects and purposes of the parties.* Proof of false representations made as inducements to enter into a contract, is admissible.† So too, to show that the actual consideration of a deed is greater or less than the amount expressed therein,‡ and that it has not been paid, although stated in the instrument to have been paid.§ If the failure of consideration expressed on the face of the instrument is shown, a different consideration may be proved.|| Or where a deed states no consideration, it may be shown what it was. Or where to a certain consideration there is added "and for other considerations," it can be shown what the other considerations were. So where a deed sets forth in consideration of natural love and affection and one dollar, it may be shown by parol what other valuable considerations passed. Conversations at the time of making a contract are admissible to show the sense they attached to a particular term.¶

As a general rule, parol evidence is admissible to explain a latent ambiguity.** It has even been held that it is admissible to raise a latent ambiguity and then explain it;†† but it can never be admitted to explain a patent ambiguity.‡‡

Thus far as to the admission of parol evidence.

A second rule as to the construction of deeds is, that it must be upon the entire instrument, and not upon parts of it. Every part must take effect, and no word be lost. Where both parts of a deed may well stand together consistently with the rules of law, they shall be construed to have that effect, rather than be held repugnant. Contradictory descriptions do not frustrate a deed if one is sufficient, but if they can be reconciled, all shall stand.§§ Indeed so anxious are the courts to give vitality to a deed, that if possible some operation will always be given to it, and in consequence it has been determined, that where a deed could not take effect as a bargain and sale, it should operate as a covenant to stand seized. And a deed intended to operate as a bargain and sale, but void as such, was held to operate by way of confirmation.||||

In construing the instrument, the language used by one party to the contract is to receive such a construction as he at the time supposed the other party would give to it, or such a construction as the other party was fairly justified in giving to it.¶¶

If two deeds be executed between the same parties at the same time, and respecting the same subject matter, they will be construed

* *Farm. & Man. Bank v. Winfield*, 24 Wend. 419.

† *Strewbridge v. Carlidge*, 7 Watts & Serg. 394.

‡ *Dorsey v. Hagard*, 5 Mis. 420.

§ *Patrick v. Grant*, 2 Shep. 233; 1 B. & Ald. 47.

|| *Webster v. Atkinson*, 4 N. Hamp. 21.

¶ *Cro. Jac.* 127.

† *Sanford v. Handy*, 23 Wend. 260.

§ *Shepherd v. Little*, 14 Johns. 210.

¶ *Gray v. Harper*, 1 Story, 574.

†† 1 B. & Ald. 247.

§§ *Shepherd v. Simpson*, 1 Dev. 237.

¶¶ *Gumston v. Bancroft*, 11 Vern. 490.

Construction.

together as forming but one instrument.* So an endorsement is considered part of the deed, when it is *affirmatively* shown to have been upon it at the time it was executed.† Or the deed may refer to any collateral authenticated writing, and the terms of such writing will be considered as incorporated with the deed.‡

The third rule upon this subject is that the grant is to be taken most strongly against the grantor.§ Exceptions in a deed are always to be taken most favorably for the grantee, and if they be not set down and described with certainty, the grantee shall have the benefit of the defect.|| So where two descriptions of land are conveyed, one by name, and the other by metes and bounds or courses and distances, the grant will operate to pass the land according to that description which is most beneficial to the grantee.¶ So where a deed will enure several ways, the grantee may elect which way to take it.** Slight evidence of the intent of a grantor to part with the whole term in a chattel, will prevent a reverter.††

These are harsh rules, and of uncertain application, and are not to be resorted to unless other rules of exposition fail. Both the reasons for them, and the uncertainty attending their application, are obvious. It is naturally supposed that self-interest will make the grantor sufficiently alive to the meaning of the language he uses to prevent a construction unfavorable to himself. In a deed poll the language is exclusively that of the grantor, and the rules above given apply therefore with greater strictness to deeds poll, than to indentures. The uncertainty attending their application arises from the fact, that from ignorance or carelessness, grantors do frequently use language inaccurate and too comprehensive, and the spirit of the law will not permit advantage to be taken of such error, if it can be avoided. Before enforcing these harsh rules therefore, courts of law will first resort to all the other rules of construction—construction even will be sooner allowed to determine the meaning of an instrument.‡‡

The fourth rule is, that if the words will bear two constructions, one agreeable to law, and the other against it, that is to be preferred which is agreeable to law. And though a certain construction be contrary to law, yet if the language is equivocal, and the instrument very old, and long custom has construed it in one way, the court will construe it in the same way.§§ But no estate can *impliedly* arise from the terms of a deed.||||

The fifth rule is, that if two clauses of a deed stand in irreconcilable contradiction to each other, the first clause shall prevail, and the latter be regarded as inoperative.¶¶ Subsequent words may be permitted to explain prior expressions, but not to control them. And the law will construe that part of a deed to precede which ought to take

* *King v. King*, 7 Mass. 496.

† 1 Hen. Bl. 254.

‡ *Jackson v. Gardner*, 8 Johns. 394.

** *Jackson v. Hudson*, 3 Johns. 375.

†† *Ewing v. Bennett*, 11 Pet. 41.

|||| 12 Mod. 38.

† *Emerson v. Murray*, 4 N. Hamp. 171.

§ *Cocheco Co. v. Whittier*, 10 N. Hamp. 305.

¶ *Hall v. Gittings*, 2 Har. & J. 112.

†† *Powell v. Brown*, 1 Bailey 100.

§§ 16 Johns. 14.

¶¶ *Cartwright v. Arnatt*, 2 B. & P. 43.

Construction.

precedence, in whatever part of the instrument it may be found.* Thus if a person were to make a lease reserving rent, *habendum* for twenty years, the lease will be held good, though the reservation of rent precedes the *habendum*.†

As to the relative importance of metes and bounds, courses and distances and boundaries, in the description of a deed, the rule is that where land is conveyed by visible metes and bounds and by corresponding courses and distances, and a further description is added bounding the land by the adjoining proprietor's, the additional description being of less certainty than the preceding one, is controverted by it.‡ So where a deed describes land by its admeasurement, and at the same time by known and visible monuments, these latter shall govern.§ Even when the monument does not exist at the time, and the parties afterwards fairly erect such a monument with the intent to conform to the deed.|| So where land conveyed is described as running a certain distance by measurement to an ascertained line, though without a visible boundary, such line is of itself a monument which will control the admeasurement and fix the extent of the land conveyed.¶ But exceptions are to be made to this rule where the reason of the rule or principle fails.**

Where land is described as bounded on a road, but the deed sets forth metes and bounds which plainly exclude the road, no part of the road passes.†† If it be evident from the calls of a deed that distance is the material and controlling object, course must yield to distance.‡‡ Where in a deed lines are run a part of the way by fixed monuments, those lines are to be continued on in the same direction, unless there is something in the deed to show a different intent. Where land is conveyed by boundaries, courses and distances, and by reference to a map of partition there is no implied covenant that the number of acres shall correspond with the number stated, the grantee has all the land within the boundaries.§§ So if it be sold by metes and bounds the purchaser so takes it, be the quantity more or less; and if the tract contains less than it is sold for, he is without remedy unless he can prove fraudulent misrepresentations on the part of the vendor.||||

The question often arises in the construction of a deed whether certain words are words of description merely, or whether they amount to a covenant. Thus if land be conveyed as bounded upon a way upon one side, this is not merely a description but an implied covenant, that there is such a way, and this too has even been held whether the land be above or below high water mark.¶¶ But if there be a way in fact existing the parties shall be supposed to have reference to such existing way as a boundary as far as it extends,

* *Dee v. Porter*, 3 Pike 18. † 10 Rep. 28 a.

§ *Smith v. Dodge*, 2 N. Hamp. 303.

¶ *Flagg v. Thurston*, 13 Pick. 145.

†† *Tyler v. Hammond*, 11 Pick. 193.

§§ *Large v. Penn*, 6 S. & R. 486.

¶¶ *Parker v. Smith*, 17 Mass. 413.

‡ *Benedict v. Taylor*, 11 Conn. 332.

|| *Blaney v. Rice*, 20 Pick. 62.

** *Davis v. Rainsford*, 17 Mass. 207.

†† *Blight v. Atwell*, 4 J. J. Marsh. 279.

|||| *Campbell v. Clark*, 6 Mis. 219.

Construction.

and not to have contemplated a way co-extensive with the land.* But if the effect of construing the words used amount to an implied covenant, be to enlarge the estate granted in the premises, the language must be very strong and marked, or it will not have that effect.† Thus in a deed of conveyance a part of the land conveyed was described "as lying west and adjacent to the tract of land first above mentioned," but as the construction contended for would have enlarged the premises, it was held, that these words were merely words of description, and not amounting to a covenant, that the land did lie west and adjacent to the land first mentioned.‡ But no rules of location of land described in a deed can be laid down, which are not subject to an infinite variety of exceptions, arising out of matters of evidence.

With reference to the comparative effect of the premises and of the *habendum*, the rule is, that if the premises of a deed are complete and perfect, and the *habendum* is repugnant thereto, the *habendum* is void.§ But this rule is applicable to deeds only.||

In general the *habendum* refers to the premises, and declares the estate which the grantee shall hold in them. It may sometimes enlarge or diminish the grant, when it is so worded as to show a clear intention to do so.¶ But it cannot operate as a grant; the premises are the operative part of the deed, and govern the *habendum*.** Thus, in the premises of a deed a slave was given *in presenti*; the *habendum* was in *futuro*; the property in the slave was held to pass *in presenti*.†† But where the premises from the terms of the conveyance are ambiguous, the *habendum* if consistent with one interpretation, will explain and control them.‡‡

When land described in a deed is bounded by the sea shore, it is a question whether the land extends to high or low water mark. By the common law, all the shore between high and low water marks belongs to the sovereign. This is the law of England, and the Middle and Southern States generally have adopted the same rule. But in Massachusetts and New-England generally, the rule is different. There, from the disposition of the early settlers to dispute every royal prerogative, it was early enacted by a colony ordinance, (1641,) that the shore between high and low water marks belongs to the riparian proprietor, provided that he do not hold more than one hundred rods below high water mark, and saving the rights of others to convenient ways. This ordinance has since been ratified by long custom, and acknowledged by the courts. Thus a deed of land bounded on the shore will convey the flats.§§ The flats too, will pass by the conveyance of a wharf with its appurtenances.|||| But the rule does not extend to the grant of a piece of land entirely covered at high

* *Parker v. Smith*, 17 Mass. 413.

† *Ferguson v. Dent*, 8 Miss. 667.

¶ *Pitts v. Mangum*, 2 Bailey 588.

** *Goodlittle v. Gibbs*, 5 B. & C. 709.

†† *Jackson v. Ireland*, 3 Wend. 99.

‡‡ *Deane v. Brpad St. Ass.* 6 Mass. 332.

† *Cartin v. Healey*, 20 Pick. 514.

§ *Porter v. Ingram*, Harper 492.

¶ *Summer v. Williams*, 8 Mass. 162.

†† *Porter v. Ingram*, Harper, 492.

§§ *Storer v. Freeman*, 6 Mass. 435.

Construction.

water,* nor where the land is described as bounded on a way, which way adjoins the sea shore.† If the land is described as *extending to* the sea shore, this does not include any part of the shore.‡

When land conveyed is bounded upon a stream in which the tide does not ebb and flow, the proprietor holds to the middle of the stream, and this though trees standing by the side of the stream are named as the points of beginning and ending.§ The middle of the stream is not necessarily equidistant from either bank. It is that part of the bed of the stream where if the water were to run out it would run last.

The above rule does not apply to navigable streams, in which the tide ebbs and flows. And in Pennsylvania it has been held that it does not apply to the large navigable rivers, in which the tide does not ebb and flow.||

With regard to lakes and ponds it has been held, that the law of boundaries as applied to rivers, does not apply to them. Land bounded on a pond extends only to the margin of the pond.¶ And in such case the margin of the pond as it existed at the time of the conveyance, is the limit, whether raised above its natural level by a dam, or depressed by the deepening of its inlet.** But there must be something permanent in the nature of the course which elevates or depresses the pond, for if the pond be unusually high from a flood or some temporary obstruction below, the purchaser will take to the usual margin of the pond.††

The rule of boundaries applicable to streams not navigable, is extended to ditches, and the grantee bounded on a ditch, takes to the middle of the ditch.‡‡

Before closing this article we propose to consider some of the legal definition which have been attached by the courts to the words most commonly in use in deeds.

The term *northerly* in a deed of land, where there is no object mentioned to incline the course towards the east or west, is construed to mean due north.§§ The words in a deed *between A. and B.* are necessarily exclusive of the termini.|||| The word *quit* in a deed is tantamount to *sell or release*, and will pass the land.¶¶ The words, *and all the buildings thereon* in a deed have no legal operation.*** *Adjacent* means *in the neighborhood of*, and not *adjoining*.††† The word *convey* in a deed amounts to a grant and passes the title.‡‡‡ A deed conveying "*one half of a tract of land*," and "*also a tract*," conveys the whole of the second tract,§§§ and parol evidence that a moiety only was intended is inadmissible. In a deed conveying a lot of land,

* *Lufkin v. Haskill*, 3 Pick. 356.

† *Storer v. Freeman*, 6 Mass. 439.

‡ *Carson v. Blayer*, 2 Binn. 475.

§ *Canal Com'rs v. People*, 5 Wend. 423.

|| *Warner v. Southworth*, 6 Conn. 471.

¶ *Revere v. Leonard*, 1 Mass. 91.

** *Crosby v. Parker*, 4 Mass. 110.

†† *Patterson v. Corneal*, 3 A. K. Marsh, 618.

† *Codman v. Winslow*, 10 Mass. 146.

§ *Lunt v. Holland*, 14 Mass. 151.

¶ *Bradley v. Rice*, 1 Shep. 198.

†† *Hathorne v. Stinson*, 3 Fairf. 183.

§§ *Brandt v. Ogden*, 1 Johns. 156.

¶¶ *Gordon v. Haywood*, 2 N. Hamp. 402.

‡‡ *Henderson v. Long*, Cooke, 128.

§§§ *Child v. Wells*, 13 Pick. 121.

Common Law Points.

the grantor made the following reservation: "And the said A. hereby reserves to himself the right of passing and repassing with teams in the most convenient place across the land conveyed." Held, that the term "across" did not necessarily confine the right of way to a transverse one over the lot, but the reservation was construed as retaining in the grantor the right of passing in the most convenient route.*

The word "appurtenances" in a deed comprehends only things in the nature of incidents to the tract conveyed—it never includes other land.†

In another number we propose to treat of the construction of wills.
W. H.

COMMON LAW POINTS.

PATENT—WORDING OF TITLE.

IN the case of *Cook v. Pearce*, 82. B. 1044, the Court of Queen's Bench decided that the title of a patent must, (though not as minutely as the specification) describe the nature of the invention; and that the patent is void if the title is so generally worded as to be capable of comprising, not only the particular invention, but the improvements not contemplated in it. As where the patent was taken out "for improvements in carriages," and the invention was in fact, an improvement in getman shutters, which were used only in some kinds of carriages. This case has recently been reviewed in the Court of Exchequer Chamber, and the judgment of the Queen's Bench reversed. Where, say the court above, the title of the patent is not inconsistent with the specification and no fraud is practised, it is not a fatal objection that the title is so general as to be capable of comprising a different invention from that for which the patent is claimed; the title "for improvements in carriages" might be taken to mean improvements in some kinds of carriages, and did not necessarily imply any untrue assertion, though in fact, the improvements were not applicable to all carriages; and the patent in this case was therefore valid. The authority relied on in the Exchequer Chamber was *Neilson v. Harford*, 8 M. & W. 806, 826.

* *Browne v. Meady*, 1 Fairf. 391.

† *Helme v. Gray*, 2 Murph. 341.

N. Y. Supreme Court.

IN EQUITY.

LEMUEL ARNOLD AND OTHERS V. GILBERT AND OTHERS.

[May Term, 1849.]

The general object and scope of a will are to be considered in giving it a construction; and any incongruity between the different parts of a will must be reconciled, if it can be done without doing violence to any expressions of the will.

If a sale of the whole realty for the purpose of fully and fairly executing the trust is necessary; the particular time at or manner in which this is directed by the will to be done, is unimportant; a reasonable time in such cases is intended, and courts of equity will see that the rights and interests of beneficiaries are not prejudiced by unreasonable delay.

Where executors and trustees under a will have implied permission to allow one third of the real estate to remain unsold, during the life of the widow, with the right to lease and insure property, and to exchange lands, &c., this does not invalidate or prejudice their right and duty to dispose of and convert into money, all the testator's real estate, which by the provisions of the will they must necessarily do, in order to comply with the direction for payment of legacies.

Beneficiaries under a will, take the gift in the character which the testator chooses to impart to it. Money, given by will to be laid out in land, vests as land.

Land, devised to be sold and the proceeds paid over, passes and vests as personalty.

Whatever in a will is directed to be done, is in equity considered as done.

An obligation to sell, express or implied, if imperative, though the time and manner of sale may be discretionary with the executors, will be considered as made, so far as the beneficiaries are concerned.

A general power in trust, imposes a duty upon the trustee, which equity will compel him to perform.

Trusts created for the benefit of creditors and legatees, and not made to depend upon the happening of any event which might carry them beyond two lives in being at the testator's death are not within the statute, and are valid.

THE questions upon which the opinion of the court were sought sufficiently appear in the opinion.

Edward Sandford, for complainant.

E. H. Owen, for assignees of D. Gilbert.

George Wood, *Charles O'Connor*, and *Dill* and *Davison*, for other parties.

McCoun, J., delivered the opinion of the court:—The first question which we are to consider in this case is, whether by the will of the late William W. Gilbert, his real estate, as devised, is equitably converted into personalty to all intents; or in other words, whether the beneficiaries under it take the estate as real or as personal property?

After giving to his wife, (among other things,) one third of the rents, issues, and profits of his real estate for life, to be paid to her so long as his real estate should remain unsold, (and when sold her thirds to be paid according to directions subsequently given concerning it,) and the use of his mansion house for a year. All of which are in lieu of dower; and giving to five of his sons each a legacy of \$5,000.

N. Y. Supreme Court.—Arnold et al. v. Gilbert et al.

payable out of his real and personal estate, as thereafter directed; and to another son, (Ephraim,) the interest of \$3,000 for life, that sum to be raised from his personal and real estate. And to a deceased son's widow the interest of \$10,000, so long as she should remain a widow, to be raised from the sales of his real estate; the principal afterwards to be equally divided between her three daughters, (grand-children of the testator,) and to two such grand-children each a legacy of \$10,000 in addition; he then, by the 10th section of the will, devises all the residue of his estate, both real and personal, to the five persons named as executors of the will as joint tenants, *in trust*.

1st. To take, have, hold, use, and possess, all the real estate, from and immediately after his death, excepting the mansion-house, and that, also, after his wife's occupancy of it for a year, and to receive the rents and profits thereof.

2d. From and immediately after his death, to sell any part of the real estate which might be necessary to pay debts.

3d. After his wife's third of the net amount of all the rents is taken out, then to pay out of the residue the interest on the legacies to the respective legatees—the interest to commence six months after his death: and if not sufficient to pay the interest in full to all, then the same to be paid rateably.

4th. From time to time to *proceed and sell any part or all of his real estate*, either at private sale or at auction, and to convey the same, in fee simple, to purchasers.

5th. Upon every sale at least one third of the purchase money to be left on bond and mortgage, if it can be done; that being his wife's right in lieu of dower, so that if she should live until his real estate should all be sold, her interest might be safely placed and made secure. This is by way of recommendation.

6th. He directs that the sales of the real estate shall be made with a view to *invest* the sums required, and to *pay* the legacies with as little delay as possible, always having a regard for the *interest* of the *whole* estate, as well as of the *particular* legatees, it being his will that the pecuniary or other devisees shall be carried into effect and consummated from the *funds resulting from or arising out of the real estate*.

Then by the 15th section of the will is this further trust declared—“That upon a sale and final distribution of the estate, there shall be an estimate, an account taken of the whole remaining—and the surplus, including the sum placed at interest for the son, Ephraim, for his support during life, as well as the funds for the use of his wife during her life, be divided and distributed in the following manner, *whenever, as soon, and as often* as can be done, to the *close and settlement* of the whole estate and its concerns; that is to say, one-seventh part to each of his sons, Garret, David, Clinton, George, and Warren, and the interest of one-seventh to each of his daughters, Mrs. Hunt and Mrs. Fish. The trusts and limitations over the shares of Mrs. Hunt and Mrs. Fish, and of the two sons, George and Warren, will be afterwards noticed.

N. Y. Supreme Court.—Arnold et al. v. Gilbert et al.

Now here are several *particular* purposes for which sales of the real estate are authorized and directed by this will: first, the payment of debts, if necessary; next, the payment of the legacies to the five sons, and the three thousand dollars to be set apart for the use of Ephraim, and the ten thousand dollars to be raised and set apart for the use of the deceased son's widow and her children, and the additional two thousand dollars to two of such children; and then there is the *general purpose* for which all the residue of the estate, both real and personal, is devised to the executors in trust, and which they are expressly directed and required to sell, viz.: the final division of it into shares of sevenths, and the distribution of such shares among the children and grand-children of the testator. The *particular* purposes of the will, above mentioned, might only require a partial conversion of the realty into personalty; but when the *general object* and scope of the will is looked at, it is very clearly to be seen that sales of the whole real estate are intended for the general purposes of the will, and that this amounts to a conversion, "out and out," or to all intents would seem not to admit of a doubt. *Kane v. Gott*, (In Error,) 24 Wend. 641.

That no time is fixed within which sales are to be made, and that it is left to the discretion of the executors to effect sales, from time to time, *when*, and in the *best manner* they can, does not alter the case. Their duty in regard to effecting sales is as imperative, upon a fair construction of this will, as though it had *specified* a time within which sales should be made, and the whole estate divided. Where no time is specified in such cases for the performance of the trust, a *reasonable* time will be allowed, and should it be unreasonably delayed, a Court of Equity will interpose and compel performance. 1 Hor. Supp. 105.

It is said, however, that one-third of the real estate might remain unsold during the life of the widow, because the will would be complied with in respect to her, and her rights under it, by the executors continuing to pay her one-third of the net rents as long as she lived. This is true; still their power to sell the whole at any time, (including the one-third,) remains unimpaired, and the necessity of doing so for the ultimate purpose of the will is not thereby lessened. The probability of the whole being sold in her life-time appears to have been in the contemplation of the testator, since he directs the interest of one-third of the purchase money to be paid to her instead of one-third of the rents. Nor does the fact that very ample powers are given to the executors, by the will, to lease out lots, (parts of the estate,) for terms of years, to insure houses, and rebuild and repair in case of loss by fire, and to look after corporation assessments, and to sell, purchase, and exchange gores, strips, or pieces of land with other owners, interfere in the least with the paramount duty imposed upon them of sooner or later effecting sales of the whole property, according to the ultimate design and object of the will, until the property can all be sold, the power to manage it to the best advantage for the interest of those concerned, may be exercised, and they are not inconsistent.

No principle is better established than this, that those who take the beneficial ownership of property under a will, take it in the character which the testator has thought proper to impart to it. If he gives money to be laid out in land, then it vests as land. If land is devised to be sold, and the proceeds is given over, it becomes personalty, and vests and passes as such. That the will in question, in all its gifts, is governed by this principle, seems to me very clear. *Money to be produced by the sale of land, and not land itself, is directed to be divided from time to time, and at the close and final settlement and distribution, into shares of sevenths, it is money only which the beneficiaries are to take.* All the directions of the will, in relation to the trust shares of the two daughters and two of the sons, refer to their shares as funds or money, to be loaned out at interest or invested in stocks.

This is likewise a case in which the conversion is to be considered as having taken place at the death of the testator, when the will went into effect. The principle on which the doctrine of conversion rests is, that whatever in a will or other instrument is directed or agreed to be done, is in equity considered as actually performed, (*Craig v. Leslie*, 3 Wheat. 563; *Kane v. Goff*, supra, p. 660.) The general rule is to date the conversion as taking place on the death of the testator, unless there is something special in the power of sale, making its exercise or performance depend on the happening of some event or contingency to arise subsequently, or on the discretion of the executor or trustee to sell or not. But if the direction is imperative, requiring a sale at all events, and leaving it discretionary only as to the time and manner of selling, then the sale when made, has the effect in respect to the rights of parties in interest, as though made immediately. *Leigh and Dalzell*, 48; *Casamajor v. Strode*, cited in note 19 Vesey, 890. In *Hutchin v. Mannington*, (1 Ves. Jr. 366,) Ld. Thurlow expressed himself very strongly on the point, that if real estate was devised upon trust, to sell in *reasonable* time, or with all possible diligence, it would not depend upon the caprice of the trustee to sell, nor upon his dilatoriness. In some way it could be sold immediately, and therefore should be considered as sold from the testator's death. Ld. Eldon admitted the soundness of that general proposition in *Sitwell v. Bernard*, 6 Vesey, 536, and in *Gaskell v. Harman*, 11 Vesey, 489, see pp. 497 and 507.

And in *Walker v. Shore*, 19 Vesey, 386, where the devise of copyhold estate was to executors in trust "to sell in such manner, and at such time as they should think proper;" it was held by Sir W. Grant, M. R., that these words, though of large discretion, did not make the right of the person who was to have the benefit of the proceeds for life dependent on the *time* at which the sale should actually take place. The trustees could not arbitrarily postpone the sale to an indefinite period; some fixed rule was necessary, by which to determine the rights of parties, and by which to hold the conversion to have been made at some given period, just as much as if the trustees had been directed to sell "with all convenient speed."

In *Fitzgerald v. Jervoise*, 5 Mad. R. 25, it was held that a devise to a trustee, to sell the real estate, "with all convenient speed," after the death of a tenant for life, was *prima facie* a direction for an *immediate sale* after such death, and entitled the beneficiary of the fund to the rents, which had accrued intermediate to the death of the tenant for life, and the time of the actual sale which had been somewhat delayed by the trustee.

See also *Ashby v. Palmer*, 1 Mer. 296, to the same effect, and *Leigh and Dalzell*, 57, for the rules deducible from the adjudged cases. This question as to the time when the conversion is effected, is perhaps not very important to the case in hand, such questions generally arise between an heir and the personal representatives of legatees or devisees dying before actual conversion, but such is not the controversy at present.

With regard to the power in this will, by which the conversion is produced; it may be observed that it is "a general power in trust," and its execution or non-execution not depending on the mere volition of the trustees, is imperative in its nature, and imposes a duty, the performance of which may be compelled in equity, (1 R. S. 734, sec. 94, 96.) And further, the execution of the power not being made to depend on the happening of *any event*, which might possibly carry it beyond the duration of two lives in being, no objection arises that it unduly suspends the alienability or absolute ownership of the property; neither is there any valid objection to it as a trust, on account of the purposes for which it is granted, the statute allowing of trustees to sell for the benefit of creditors and legatees.

This estate then in the hands of the trustees, being treated as money, we are next to inquire whether any thing in the trusts or limitations over of any of the shares or portions into which it is divided, are contrary to law.

In considering this branch of the case, it is only necessary to apply to it the rules of law as prescribed by the statute, in relation to expectant estates in personal property. Trusts may be created of such property; future and contingent interests in it may be given, and all that the policy of the law requires is, that the absolute ownership shall not be suspended by any limitation or condition, annexed to the gift for a longer period than during two lives in being, at the death of the testator, if the gift is by will, and in all other respects, that the limitations of further or contingent interests in this species of property, shall be subject to, and not transcend the rules, also prescribed by statute in relation to future estates in lands. (1 R. S. 773, sec. 1, 2.)

A strong argument has been presented on the hearing against the late chancellor's doctrine, in a number of cases decided by him, that the 63d section of the statute of uses and trusts, is to be applied by *analogy* to trusts of *personal* property; we are inclined to think with *Cowan, J.*, that a statutory provision which has reference only to trusts for the *receipt* of the *rents* and *profits* of lands, ought not to be extended by the courts, because of the analogy to trusts of personal property, (24 Wend. 666, 667, for his opinion,) and if necessary to this case,

we are prepared to say that the 63d section has no application. There are only two portions of the estate, in regard to which the limitations over, present any serious question of being too remote. The first is the one-third of the capital set apart for the widow's use during her life. At her death this third is to be divided, as forming part of the residuary estate into equal sevenths—one-seventh goes to Garret absolutely; one-seventh to David, in like manner; one-seventh to Clinton, in like manner; one-seventh to Elsey Fish for life, or so long as she remains single, and at her death or marriage, to her children or next of kin, absolutely, as in case of intestacy. All these are clearly valid gifts. That to Mrs. Fish will vest an absolute ownership in her personal representatives at her death, (if it does not sooner vest by her re-marriage in her children,) and her death is but the termination of a second life estate in so much of the fund.

The interest of one other seventh is given to Catharine Hunt, during life, or while she remains single. At her death or re-marriage the principal of her share, less five thousand dollars, taken out and invested for her daughter, Matilda Vail, during life, with remainder to the daughter's heirs (next of kin,) reverts and become a part of the residuary estate, to be divided into six parts between the five sons, and the daughter Elsey Fish, she to take her sixth of this seventh in the same manner as she takes her original one seventh, the limitation being the same.

The sons, Garret, David, and Clinton, each take their sixth of Mrs. Hunt's seventh, in the same manner as they take their original sevenths, that is, absolutely. By the 19th section of the will, however, George and Warren's original seventh and their sixth of Mrs. Hunt's seventh, are placed in trust for investment, and the interest only is to be paid to them respectively, during their lives, and the remainder to their children; "but in the event of either or both dying without children, then living," their shares fall back into the estate, to be again divided equally between the sons, Garret, David, and Clinton, and whichever of the two, viz., George and Warren, happens to survive the other. And to the survivor the interest is still limited for life, and the principal is to be divided after his death in the manner directed, with respect to its original seventh part. The effect of the 19th section of the will, so far as George and Warren's share of the estate generally are concerned, is to give by way of cross remainders a contingent interest for life in each other's shares; a contingency depending on the event of either dying without children, living at the time of his death, (a possible, if not a probable event,) and therefore operating in law, to prevent the vesting of an absolute ownership in their respective shares at their deaths. This is so, both as to their original sevenths, and as to their sixths of the seventh given in the first instance to Mrs. Hunt. The vesting of an absolute ownership in the former, however, is not thereby postponed beyond two lives, nor is it so postponed in their sixths of Mrs. Hunt's seventh, except in her seventh of the one-third set apart in the first instance to the widow's use. In that one-third there was first a life estate in her,

then a remainder for life in one-seventh of the third to Mrs. Hunt, and then a remainder over of a sixth of that one-seventh to each of the sons, George and Warren, but not so limited as to vest in either of them an absolute ownership on the death of Mrs. Hunt. The limitations in favor of their children as purchasers, or takers in their own right or to the children of the survivor, and in case none are living at their decease, then to others, are too remote and of no effect in law, and hence it is that there is here an intestacy as to two-sixths of one-seventh of a third which is equal to a sixty-third part of the whole estate.

The other portion of the estate, about which a similar question is made, is the three thousand dollars set apart for the benefit of Ephraim during life.

By the seventh section of the will, this sum, after the death of Ephraim, is expressly given "to be equally divided between the five sons, including Warren and George, their executors, administrators, and assigns, share and share alike," words importing absolute vested gifts. But by the 15th section, it would seem as if this three thousand dollars was to be included in the final distribution, and to be divided into seven parts, George and Warren each taking a seventh of it under the trust, and subject to the limitations declared in the subsequent 19th section. It is the duty of the court to reconcile this seeming incongruity and repugnancy, if it can be done without doing violence to any of the expressions of the will. In the first place it may be observed, that the language of the 7th section is clear and explicit in dividing the \$3000 avails into five parts, and giving to each son an absolute ownership. There is no ambiguity in that part of the will, while the 15th section is so framed as to admit of some latitude of construction and meaning. It speaks of what shall be done "upon a sale and final distribution of the estate," and it authorizes distribution to be made, "*whenever, as soon, and as often as can be done to the close and settlement of the whole estate and its concerns;*" these words show that the testator expected dividends to be made from time to time, and in making the estimate or account for the final settlement and distribution, the Ephraim fund and the widow's third are to be included. But suppose those funds have been divided and paid over, previous to the final distribution, as they might be on the dropping of the lives, then of course the parties would be charged with the amounts paid to them as so much on account of their sevenths of the estate. The will very clearly allows this to be done. And so, if at the time of making the final settlement and distribution, the fund of three thousand dollars is not ready to be divided, (Ephraim being still alive,) yet as the other five sons are to receive it at his death, each of them may be charged with a fifth of the amount, as so much towards his general residuary share in like manner. In this way the will is complied with, and the 7th and 15th sections are made to harmonize. As George and Warren take their shares of the three thousand dollars, absolutely according to the seventh section, the same are not necessarily brought under the trust declared in and by the 19th section. The "part or portion" there spoken of as given to

Bill of Exchange.

George and Warren, must be understood as the part or portion given to them by the 15th and 17th sections of the will. It is not to be supposed that those words were intended to embrace the legacy of five thousand dollars, previously given to each of them by the sixth item of the will, because the trust of those legacies had already been fully declared, and there is less reason to believe that the testator intended the trust should embrace their portions of the three thousand dollars, after using words so strongly expressive of absolute gifts, as he has just used in relation to the shares of that money.

After a careful examination of all the other trusts and limitations, contained in this somewhat complex will, we find nothing more to condemn than the limitations over of the two-sixths of Mrs. Hunt's seventh of one third of the estate, as to which there is virtually an intestacy. But this has not the effect of disturbing the whole will. All the other provisions, trusts, powers, and limitations, remain in full force.

The decree appealed from, made by the late vice-chancellor, invalidating the whole will—must therefore be reversed, except so far as it sets aside the trust of one-sixty-third part of the whole estate, which portion remains undisposed of by the will, and is to be distributed as in case of intestacy among the next of kin of the testator. The decree now to be entered may provide for the taking of an account of that part of the proceeds of the estate, and for the distribution of it according to law—first, however, taking out of it the costs of this suit to all the parties who have appeared and litigated it, which costs, we think, should be borne by this fund, and not by the defendants personally, nor by any other portion of the estate.

BILL OF EXCHANGE.

A CASE of some importance lately came before the Court of Exchequer in England. *Halifax v. Lynn*; the question was whether the acceptor of a bill of exchange was estopped from disputing the title of the drawer, except where it appeared that the bill had been altered after acceptance. The action was brought by the endorser of the bill of exchange, drawn on and accepted by the defendant; the latter pleaded that the bill was drawn and endorsed by the "Company of Copper Miners of England," which had obtained a charter of incorporation in the reign of William and Mary, but was signed and endorsed in writing only, and not sealed with the corporation seal. To this plea the plaintiff demurred, and after argument, *Parke, B.*, who delivered the judgment of the Court of Exchequer, said that the court were of opinion that the demurrer ought to be allowed. The defendant had accepted a bill payable to the order of the drawer, and could not therefore dispute the title of the drawer unless it appeared that the bill had been altered after his acceptance. The bill showed a valid consideration on the face of the contract, and must be taken either to have been in its present form when accepted, or to have been accepted in blank and afterwards filled up. In either case the defendant was estopped from disputing the title of the drawer. Judgment was accordingly given for the plaintiff.

N. Y. Surrogate's Court.—In the matter of Nelson Place, administrator.

Surrogate's Court.

[New-York County.]

Before the Honorable ANTHONY L. ROBERTSON, Surrogate.

IN THE MATTER OF ACCOUNTING OF NELSON PLACE, *Administrator de bonis non, &c.*, OF JOHN ADAMSON, *deceased*.

Though an account in a specific form cannot be compelled in a Surrogate's Court, yet a statement which does not clearly present the results upon points in reference to which the decree is final, must be looked on with suspicion as to their fairness.

The admission into an accounting by an administrator of a sum as the proceeds of land sold by him, and the distribution of the amount found due by such accounting by a final decree therein to the heir at law, would operate as an estoppel against the latter to deny the validity of the sale. The power of an executor at common law is confined to the personal estate, and is adhered to in all the statutes of this state.

Legal assets are subject to preferences among creditors. Equitable assets are distributable equally; and this distinction is carried out in statutory provisions for the distribution of proceeds of lands in the hands of an executor, by authority of a surrogate.

Express authority, by separate legislative provisions, was deemed necessary to be given to the surrogate to exercise any jurisdiction over the proceeds of lands sold under authority of a last will.

Any provision conferring additional powers upon an administrator, contrary to the general scope of a statute, must be strictly construed.

The exercise of the right by a surrogate to appoint a trustee to sell lands, would be mischievous in various particulars. 1st. As to the limitation of the persons to be appointed. 2d. Omitting notice of the application to interested parties. 3d. Dispensing with proof of the will as one of real estate. 4th. As to the security to be taken. 5th. As to his accounting.

Such right would clash with the powers of the Court of Chancery in relation to trustees.

The doctrine of an executor's powers, as executor, beyond those over personal estate, only applicable to three cases. 1st. When no trustee to sell is named, and the proceeds of land sold are to pay debts and legacies. 2d. The provision (2 R. S. 109, § 55) permitting a sale by those executors only who have proved a will. 3d. The survivorship of a naked power to sell in a will.

The history of the statute giving to administrators with the will annexed the powers of executors, traced.

That statute does not authorize the execution by administrators with the will annexed of powers of sale given to executors.

Where an executor is removed by a surrogate, the person succeeding to the administration of the estate is not chargeable with moneys collected by the former, or the value of chattels to whose use a legatee is entitled for life by the will.

THE facts appear in the opinion of the surrogate.

H. M. Western, for the applicants.

C. Lawton, for the administrator.

THE SURROGATE.—This is an application to enforce an account by an administrator with the will annexed, of assets left unadministered by a former executor. An account has been rendered by him, to which several objections are made by the applicant. These objections may be reduced to three. First. As to the form of rendering the account by mixing personal and real estate together. Secondly. That the administrator has included in his account the proceeds of certain lands belonging to the testator, sold by him by virtue of a

N. Y. Surrogate's Court.—In the matter of Nelson Place, administrator.

power given in the will to the executors therein named. Thirdly. That he has not accounted for assets in the hands of the former representative.

As to the first objection—If the statement offered as an account comprehended a full detail of all assets received and paid out, and of the condition of the estate, I do not know that a surrogate's court, not being a court of record, can lay down strict rules for the government of litigants as to the form of presenting their rights; but a confused and miscellaneous statement must always be looked at with suspicion; particularly where the statute itself points out the effect of the account when passed. The account ought to present clearly, so as to be seen at a glance, those results, in reference to which the decree is final, and so as to enable the court readily to make the abstract required by law. A deviation from established practice, must be looked upon as being intended to obscure the investigation, and therefore the presumption must be against their accuracy in weighing evidence; but I do not know that I have the power to reject accounts simply because the different elements are intermingled. This objection I must, therefore, overrule.

In reference to the second objection, it is urged that if the administrator with the will annexed, choose to become responsible for the sum inserted as the price of the lands, the heir cannot be prejudiced, as his title to the land, if any, would remain unimpeached. But I apprehend that the effect of a decree, on the basis of admitting this item, and the payment of the amount to the next of kin, would be precisely the same thing as payment directly by the administrator of the proceeds of the sale, as such, to the heir, and that the latter receiving them as such would be estopped, at least in a court of equity, from denying the purchaser's title, (*White v. Swain*, 3 Pick. 365; *Jennison v. Hapgood*, 10 Pick. 77; *Hicks v. Cram*, 17 Verm. 449,) for, by not objecting, he induces the administrator to part with the money. It, therefore, becomes necessary for the court to pass upon this question of his power in a proceeding like this, where both parties are actors. It becomes necessary, therefore, in order, in the first place, to investigate the power of an executor, as such, at common law. That power will be found to be strictly confined to the personal estate; of that he was the "*hæres nominatus*"; the residuary legatee, after payment of debts and legacies. It was only by help of a supposed claim on his conscience, by words of trust in the will, he was subjected to the jurisdiction of ecclesiastical tribunals as trustee for the next of kin. Every elementary writer, even the most modern, defines and treats him as such representative of personalty alone. Blackstone entitles him, "the person to whom the execution of a last will and testament of personal estate by the testator's appointment, is confided." (2 Com. 503; see *Farrington v. Knightly*, 1 P. Wms. 548, 549.) As far back as Shepherd's Touchstone, the only things described as assets in his hands are "goods, chattels, actions and commodities," all being personal. This principle is adhered to and taken for granted in all existing statutes in regard to the duties, powers, and control over executors and

N. Y. Surrogate's Court.—In the matter of Nelson Place, administrator.

administrators. Letters of administration are entitled of the "goods, chattels and credits" of intestate persons, (2 R. S. 73, § 63,) which in subsequent parts of the statute are considered as synonymous with assets. Their power to commence suits is confined to the personalty. (2 R. S. 113, § 3.) The inventory which is to be filed, is of goods, "chattels and credits," (2 R. S. 82, § 2,) which are termed assets in the enumerations of what are to be assets, (Id. § 6,) and in one section (§ 7,) the distinction between an executor and a devisee is marked; and the final account which is to be rendered, is solely of personal estate, (2 R. S. 94, § 65.) It thus appears that the legislature had distinctly in view, in framing the statutes as to executors and administrators, their limited authority.

"But," as an excellent writer on the powers of executors observes, (2 Williams on Ex'rs, p. 1033,) "there are besides various interests frequently forming part of the estate of an executor or administrator which are not recognised as assets in law, and which therefore, if administered at all, must be administered in equity. This latter portion of the estate in the hands of an executor or administrator, is called equitable assets, in contra-distinction to the former, which is called legal assets: in other words, legal assets are such as are liable to debts in the temporal courts, and legacies in the spiritual, by the course of law. Equitable assets are such as are liable only by the help of a court of equity." The grand practical distinction to suitors, as to those two kinds of assets, was, that legal assets were subject to preferences among creditors, while the other were distributable equally; this distinction is observed in the only cases where, by statute, proceeds of lands in the hands of an executor are made amenable to the jurisdiction of surrogates' courts. Generally, the assets in the hands of an executor are to be applied in a certain order of priority to the payment of debts. (2 R. S. 87, § 27.) If a will orders real estate to be sold to pay debts, where the conversion is "out and out," the surrogate before whom it is proved has jurisdiction to decree distribution, but then the same order of preference as to debts is to be observed as if originally personal property, (2 R. S. 110, § 67); but in case of a sale of land by order of the surrogate, (2 R. S. 106, § 38,) or where it is merely authorized by a will to be sold by executors, (Laws of 1837, p. 537, § 75,) (which is discretionary,) the proceeds are to be divided equally among all creditors, without observing any preference. While this distinction seems to have been kept in view by the framers of those statutes, they seem also to have considered distinct and separate provisions necessary to give a surrogate's court jurisdiction over the proceeds of land. This latter necessity was pointed out by the decisions which settle that the proceeds of land sold by authority of a will are merely equitable assets, (*Clay v. Willis*, 1 B. & C. 364; *Barker v. May*, 9 B. & C. 489.)

The statutory provisions referred to make the distinction between an out and out conversion and a discretionary authority, by a marked difference in the language. In addition to this the three sections relating to the sale of real estate under an authority contained in a will

N. Y. Surrogate's Court.—In the matter of Nelson Place, administrator.

(2 R. S. 106, § 31, 32, 33,) use only the word "*executors*" yet in all other parts of the statute where a duty common to both is spoken of "*executors and administrators*" are always coupled together, taking for granted therefore that such power can only be exercised by an executor.

From these considerations it follows that by this body of statutory law the character of the executor and his peculiar trust are preserved; the court by whom he is appointed and who has jurisdiction over his conduct, is considered as confined in its exercise to personal property; express additional jurisdiction is conferred on it, in specific cases in which the distinction between the trust-property which passes into his hands as trustee or as executor is still preserved; in giving such additional jurisdiction, its exercise is confined in terms to the original trustee, and not extended to any substitute appointed by the surrogate's court; and lastly the commission of such substitute in the shape of letters of administration is simply to administer "*goods, chattels and credits*," (2 R. S. 73, § 23;) and provision therefore for conferring additional powers upon the administrator, must necessarily be anomalous, and not intended to be subject to the general provisions of the statute, and can derive no support from the general scope and object of the statute, or in other words ought to be strictly construed.

This view will be found to be greatly strengthened by a variety of other provisions in the statute which would render the execution of a power of sale of lands or a trust to sell them by an administrator with the will annexed, mischievous in the extreme. First as to the person to be appointed; secondly, as to notice of the proceedings to the parties interested; thirdly, as to the proof of the will as far as it relates to lands; fourthly, as to the security; and fifthly, as to his accounting. A court of equity is unrestrained in its discretion as to the person to be selected as a trustee; and relationship has no effect, nay most frequently the nearest relatives are the objects of the trust or *cestui que trusts*, particularly where they are females, such as wives, children or those who are children of the same parent, yet the surrogate has no discretion unless there is a personal objection, but must appoint the widow first and then the next of kin, (2 R. S. 71, § 14;) and not unless there is no residuary legatee, or principal, or specific legatee, though they have no interest in the real estate, can he exercise unlimited discretion in the appointment. Secondly, the appointment is made without notice to any of the *cestui que trusts*, (2 R. S. 74, § 27, p. 76, § 35.) Thirdly, it is not prescribed any where that any investigation shall be made into the execution of the will as a will of real estate before granting letters of administration with the will annexed; nay they may even be issued on a will proved abroad as a will of personal estate only, (2 R. S. 70, § 6.) Of what avail would the deed of such an administrator be? Lastly, the only accounting and distribution by the order of the surrogate prescribed is of personal estate, (2 R. S. 96, § 72,) except that under the two sections to which I have already referred (2 R. S. 110, § 57, Laws of 1837, p. 537, § 75,) which are in terms confined to executors strictly and are

N. Y. Surrogate's Court.—In the matter of Nelson Place, administrator.

made separate objects of jurisdiction. Nay, it was deemed expedient in the very clause which is alone relied on for the power claimed, to add to the words prohibitory of the exercise of power, the qualifying words "as such executor," (2 R. S. 71, § 15.) These latter of course would be unnecessary if there were no distinction in the powers of executor and devisee in trust.

But if such a power be any where given it would clash with the powers given to the Court of Chancery. The statute in regard to trusts, (1 R. S. 728, § 55,) speaks of executors but says nothing as to administrators with the will annexed, and that although two of the trusts enumerated are those usually discharged by executors. It also provides expressly that on the death of a surviving trustee, the trust shall devolve on the Court of Chancery and be executed by some person appointed by them for the purpose. (1 R. S. 730, § 68.) It may also accept a resignation of, or remove a trustee and appoint a new one, (*Id.* § 69, 70, 71,) which provisions are also extended to powers in trust. (*Id.* 734, § 102.) It does not require much imagination to suggest extraordinary conflicts of jurisdiction unless the Court of Chancery is deprived of it where a trust is attached to an appointment as executor, or even in any case where a trust is created by a will, for clearly it cannot appoint an administrator, which power is exclusively vested in the surrogate's courts, and if it should appoint a testamentary trustee and the surrogate appoint an administrator with the will annexed, whose powers are to predominate? If the Court of Chancery removes a trustee, it may appoint a new one, does he become administrator also? No one can believe when this statute was drawn and passed, its framers or the legislative body that adopted it, dreamed of a surrogate appointing a testamentary trustee of lands.

I think the clause of the statute in question, (2 R. S. p. 72, § 22,) may, after this examination of other statutes upon similar subject matters, be handled without any danger of giving it an extended signification beyond its ordinary interpretation, unless too plain to admit of doubt; in such case we are bound to think the law-maker had some object in view which escaped our observation. The language, which is peculiar, is as follows: "The administrators with such will annexed shall have the rights and powers, and be subject to the same duties as if they had been named executors in such will;" not "the persons named as executors in the will," nor even "as if they had been executors," but simply as "if they had been named executors; this phraseology "being named executors" is used throughout the statute in which it is evidently intended to convey only the idea of the use of such language in the will as would confer the ordinary powers of executors, and not as though the names of the administrators were to be considered as being substituted in the will in the place of the persons designated as executors; "to name a person an executor" in a will gives him certain definite powers, (God. Orph. Leg. p. 2, c. 5, § 1,) and if he has any other powers it must be by some other mode than naming him an executor. It is barely possible that the words

N. Y. Surrogate's Court.—In the matter of Nelson Place, administrator.

of this statute could be literally complied with, and the powers of a devisee in trust conferred on an administrator where a testator, without giving the names of his testamentary trustees in the clause devising to them, should devise lands in trust to the parties "therein named as executors," and should afterwards name his executors; but it still would be adverse to every other part of the statute. In this phrase the language is slightly varied from that of the statute on which it is founded (1 R. S. 319, § 321,) where it is "as if they had been executors named" (or designated) "in the will," which much more strongly favors this interpretation, now contended for, its stress being not on the epithet of "executors," but as if their names had been inserted in the will; yet even it was never imagined to convey such power. Another clause (2 R. S. 71, § 15,) is called in and of the suggested interpretation which prescribes that "every person named as executor in the will, and not named as such in the letters testamentary, shall have no power as such executor," but it is actually adverse to it, for it has been thought necessary to add in it the words "as such executor" to the general restriction, implying of course, other powers subsisting in him besides those as executor. The object of this provision was solely to change the existing law by which the admission of a will to probate gave full power to the persons named as executors in it, without any letters testamentary.

I therefore do not see that the literal interpretation of the words of this clause requires the gift to administrators of all the powers of a devisee in trust, as assumed in the case of *Egerton's administrator v. Conklin*, (25 Wend. 425.) But it seems to be supposed that there is a species of intermediate interest in real estate where the rights of a personal representative and a devisee in trust clash, that this is not strictly either assets or a trust estate, over which the executor is supposed to have control not as executor strictly, but "*virtute officii*:" That expression for this purpose must be understood to mean his office instead of being his mere duty as it ought to be interpreted. I have been much embarrassed to understand what is meant by this interest, whether it means powers and trusts given by a will to the executors of it, not by name, but designating them by that term, or whether it means the gift of powers to discharge executor's duties that is paying debts and legacies and making distribution. It is to be remembered that a devisee's rights are complete on the death of the testator, an executor only after probate. The proof of a will before the surrogate as a will of real estate is only *prima facie* evidence of its execution, (2 R. S. 58, § 15,) and letters of administration are issued on its proof as a will of personal estate only, (2 R. S. 69, § 1.) So too, if the controversy be carried on in different courts, a will might be avoided as to one and not as to the other subject of its disposition; nay, the will might not dispose of a particle of personal estate and appoint no executor, so as to be incapable of being proved as a will of personal estate; will it be contended that a devisee in trust could not sell without probate? This idea, however, of an executor's powers over real estate, "*virtute officii*," may be traced to three sources.

N. Y. Surrogate's Court.—In the matter of Nelson Place, administrator.

First, in cases where the proceeds of lands are to be applied to the payment of debts and legacies, and no trustee to sell is named, it is presumed to have been the intent of the testator that a person named as executor should be such trustee. (Sugd. on Pow. 174, 4th ed.) Secondly, in cases under the Stat. of 21 Hen. VIII. c. 4, substantially the same with 2 R. S. 109, § 55, passed to remedy the defect, parties not taking upon them the execution of a will containing a power to sell; in that statute the words "lands willed to be sold by executors," deceased, which were held to include devisees to executors to sell, (Co. Litt. 113, a,) but that interpretation was limited in cases where the devisees were executors to an estate given to them as executors or to enable them to make distribution. (*Denio v. Judge*, 11 East, 288; *Bonifaut v. Greenfield*, Cro. Eliz. 80.) Thirdly, in cases where the survivorship of a naked power was in question, where one of several donees of it also made executors, remained; there where the power was given to the parties by name, and not to the testator and executors, its surviving was doubted. (Sugd. on Pow. 167, 4th ed.) It is only in these three classes of cases, and either in reference to the person who was to take the character of the power, or its survivorship, that the question can arise of taking a power not "*virtute*," but "*ratione officii*," that is not by force of having the duties of an executor to perform, but by reason of being an executor. (Co. Litt. 113, a; Sugd. on Powers, *ubi sup.*) After a diligent investigation of all the cases, I have been unable to find any other in which the fact of being clothed with the powers of an executor has any effect upon a power over land. I do not, therefore, perceive how any of these principles can have the effect of vesting an administrator with a power of sale of lands.

But it may be wondered at, how so apparently sweeping a provision crept into the statute. If we trace it to its source it will be found to have originated in a statute whose object was not to prescribe the powers of those who were to distribute, but the rights of distributees, and formed an isolated provision in the English statute of distribution (2 Ev. Stat. 395, § 9,) from which it passed into the revision of the laws of this state in 1787, (1 Greenl. L. 368, § 16,) directing the will of a testator to be observed, even where there was an administrator. In laws passed in 1801, (1 R. L. p. 541, § 20,) whose title did not have the slightest reference to real estate and only prescribed the duties of executors, was added the provision that the act should extend to administrators with the will annexed, with a view of preventing unnecessary repetition in the body of the act when executors were spoken of; with this view also it was transferred to the statutes of 1813, (1 R. L. 316, § 21,) from which it was adopted in the Revised Statutes. In none of the periods of existence of these statutes was the power ever sustained, although the want of any concurrent provisions inconsistent with such interpretation might have rendered it much more plausible than under the present statute.

With this mass of concurring testimony, I am constrained to decide according to the opinion of the Supreme Court in *Egerton's adm'rs. v.*

Points in Equity.

Conklin, (21 Wend. 432,) that the administrator with the will annexed, cannot exercise a power of sale contained in a will, although some judges of the court above on an appeal taken in that case, (25 Wend. 225,) seem to have come to a summary conclusion to the contrary, although their views are mere *obiter dicta*, as the decision was put on other grounds; for neither is the language as broad as they seem to suppose, as I think I have shown, nor is the inconvenience of appointing a testamentary trustee by the court of chancery greater than that of appointing any other trustee; and the section to which I have already referred, (2 R. S. 71, § 15,) on which so much stress is laid, only prohibits powers "*as executor*," and not generally; and it may be much more rationally doubted whether the appointment of an administrator, the mere representative of personal estate, at all affects trusts or powers created by devise, than whether he acquires control over them.

For these reasons I must hold the sale of lands by the administrator with the will annexed, void, and the proceeds thereof, as well as the rent of the lands, must be excluded from the accounts, as well as all moneys paid out on account of the real estate.

In regard to the second objection to this account, as to the omission to charge the administrator with money or property in the hands of the executor, he is not chargeable with any moneys collected by that executor, for which the parties have their remedy against his representatives, but only with such assets as came specifically into his hands, and were lost by his neglect. So, too, he is not chargeable with the value of any chattels in the use of which a life estate is given to the widow of the testator, or any other person; the parties in remainder having their remedy, in case of danger, by requiring security.

The account must, therefore, be referred to an auditor, with the usual powers, who is to amend it by excluding therefrom all charges for the proceeds of real estate sold, or any payments or expenditures on account of real estate, and is only to charge against the administrator moneys lost by his negligence, and not those omitted to be collected by him from the removed executor, or the value of any articles left in the hands of a legatee who had a life estate therein.

POINTS IN EQUITY.

TRADE MARKS—INJUNCTION.

We have heretofore given all the decisions on this important and interesting subject; we now add a notice of a recent decision in 10 Beavan, 297, (*Franks v. Beaver*.) In that case it appeared that the plaintiff invented and sold a medicine under his own name—that the defendant also made and sold a similar medicine, and on his labels he used the plaintiff's name and certain certificates given of the efficacy of the plaintiff's medicine, in such an injurious manner, as *prima facie*, though not in fact, to appropriate and apply them to his own medicine. The Court said, that although there were other differences in the mode of selling the medicine, the proceeding was wrongful, and the defendant must, therefore, be restrained by injunction.

N. Y. Supreme Court.

(General Term, Delaware.)

THE PRESIDENT OF THE BANK OF ITHACA V. BEAN AND OTHERS.

COMPETENCY OF WITNESS—INTEREST IN EVENT OF ACTION.

The president of a bank, who was a large stockholder, gave evidence as a witness for the bank, in an action by the bank against a third person, to recover the amount of a promissory note claimed to be due to the bank.

Held, that his testimony was improperly admitted.

This was an action of assumpsit tried before His Honor Hiram Gray, at the Tompkins Circuit, August, 1848, and was brought against the defendants, as makers and endorsers of a note payable to and discounted by the plaintiffs. On the trial William Randall, who it was admitted was the president of and a large stockholder in the bank, and was such at the time of the discounting of the note in suit, was offered by the plaintiffs as a witness, and received under the defendants' objection. A motion was by them made at the Madison General Term, January 1st, 1849, for a new trial on a bill of exceptions.

Lewis Kingsley, for the defendants.

S. Fairchild, for the plaintiffs.

By the Court. MASON, J.—The only question presented by the bill of exceptions in this case is, whether the president, who is a stockholder in the bank, can be a witness for the bank, in a suit against a third person, to recover the amount of a promissory note claimed to be due to the bank. The plaintiffs claim that sections 351 and 352 make him a competent witness. Section 351 is as follows:—"No person offered as a witness shall be excluded by reason of his interest in the event of the action." This section is qualified by section 352, which provides that—"The last section shall not apply to a party to the action; nor to any person for whose immediate benefit it is prosecuted or defended; nor to any assignor of a thing in action, assigned for the purpose of making him a witness."

It was insisted upon the argument of this cause by the counsel for the plaintiffs, that this suit was not brought for the immediate benefit of the stockholders: that, on the contrary, the action was brought for the immediate benefit of the corporation, while the stockholders were only interested in the fund recovered after the debts of the corporation were paid, and the bills that were in circulation were redeemed. That, in fact, this artificial being—the corporation—stood between the stockholders and this suit, and that under the peculiar organization of such corporations, under the provisions of our statutes, the

stockholders might, in fact, never come into possession of any of the funds recovered in this suit : in the first place, that although the 26th section of the plaintiffs' charter, (Laws of 1829, p. 324,) requires the directors to make dividends semi-annually, that the general statute regulating all of these monied corporations (1 R. S. 591, sects.) prohibits them from making any dividends at all, except from the surplus profits arising from the business of the corporation ; and that this same statute prohibits the directors from permitting any of the capital stock from being divided or withdrawn in any manner to reduce the capital stock ; and, in short, that by the general statutes of the State, regulating monied corporations of this character, the stock is pledged for the security of the debts of the corporation, and the redemption of the bills in the hands of the bill-holders, &c., and that consequently, the stockholders cannot be said to be the persons for whose immediate benefit the suit is brought.

I am constrained to say, after a careful consideration of this case, that this argument appears to be more specious and ingenious than sound. It is too thin, and cannot stand in the light of true criticism. This is a corporation aggregate, and a corporation aggregate is a collection of individuals united in one body, under such a grant of privilege as secures a succession of members, without changing the identity of the body, and constitutes the members for the time being one artificial person or legal being, (1 Hill, 620 ; 2 Kent's Com. 283) : and such the second section of the plaintiff's charter makes the stockholders of this corporation. That section provides, that "all persons who shall become holders of the capital stock of the said bank, pursuant to this act, shall be, and they are hereby constituted a body corporate," &c.

The stockholders constitute the corporation, and without them the artificial being—the corporation—has no life or vitality. They do, in fact, constitute the very element of the corporation, notwithstanding that in legal parlance an artificial person is made to step in under the name of a corporation aggregate, and represent these stockholders. I think that, in a corporation like this, to say that the suit is brought for the immediate benefit of the corporation, and not that of the stockholders, is making a distinction in a case where none is perceptible.

If this suit is brought for the immediate benefit of this corporation aggregate, then, it seems to me, that it is very difficult to say that it is not for the immediate benefit of that which constitutes the corporation aggregate. And the very act creating this corporation makes the stockholders to constitute the corporation. And so these corporations have been considered under the wise and well-considered principles of the common law. The language of the common law is, that when corporations of a private nature, instituted for private emolument, such as banks, insurance companies, &c., bring suit, the interest of the corporation is *direct* and *immediate*. (2 Cow. & Hill's Notes, 1543 and refs.)

But again, in the absence of all proof, a bank as well as a private individual, is to be presumed to be solvent until the contrary be shown :

N. Y. Court of Common Pleas.—New Rules.

and if we are to consider this case with the legal presumption of solvency, which the law, in its presumption, applies to the plaintiffs, then I do not see how the argument of the plaintiffs' counsel can be sustained, for that argument is predicated upon the position that the bank may perchance be insolvent.

I cannot but think, after the best reflection that I have been able to give to this case, that the learned justice erred upon the trial of this cause, in allowing the president of this bank, who was a large stockholder, to be sworn as a witness for the plaintiffs, and consequently that the exception of the defendants to this ruling upon the trial, was well taken. It follows, therefore, that there must be a new trial granted in this cause, with costs to abide the event.

New trial granted.

Court of Common Pleas**OF THE CITY AND COUNTY OF NEW-YORK.****NEW RULES.**

THE following rules, with reference to the hearing of appeals from the Marine Court and from the Justices' Courts, have been made.

1. If the appellant does not procure the return to be made to this court within the time prescribed in sec. 360 of the Code of Procedure, the respondent may serve a notice in writing, requiring the same to be done within ten days thereafter, and that in default thereof, he will apply at the general term on the first day for an order dismissing the appeal, and upon proof of the service of such notice, and of a non-compliance therewith, such order will be granted, unless the court grant further time therefor.

2. If the court below shall not make the return to this court as prescribed by the Code, the appellant may apply by motion to a judge at chambers, to compel such return by attachment.

3. If the return be made and noticed pursuant to the Code, the appeal shall be heard on written arguments or points. The appellant shall serve his argument or points on the respondent or his attorney, at least five days before the commencement of the term. The respondent shall serve his answer on the appellant or his attorney, before the first day of the term. The appellant may reply thereto, and the case shall be submitted to the court on such first day of the term, for which the same shall be noticed. Only one copy of the argument and points shall be prepared, and if either party omit to serve or submit his points or arguments, as above specified, he will be deemed to have waived the right so to do.

4. Either party may move at chambers, before the first day of the general term, on notice that the appeal be argued orally, and on good cause being shown therefor, such motion may be granted.

5. The clerk shall make a separate calendar of such appeal cases.

6. The appellant or respondent may furnish a fair copy of the original papers for the use of the court.

SELECTIONS FROM RECENT ENGLISH DECISIONS.

Court of Chancery.

Before the LORD CHANCELLOR.

HIS ROYAL HIGHNESS PRINCE ALBERT V. STRANGE.
8th February, 1849.

INJUNCTION—COPYRIGHT IN UNPUBLISHED WORKS.

Injunction restraining the publication of a catalogue of unpublished etchings, on the common law right of property, and on a breach of trust in obtaining the information.

THIS was a motion to dissolve an injunction granted by the Vice-Chancellor, Knight Bruce, restraining the defendant from publishing a catalogue of certain etchings.

J. Russell, Rolit, Warren, and S. Smith, for the appellants.

The Solicitor General, Talfourd, Sergt., and W. James, for the respondents.

THE LORD CHANCELLOR said, that the right to restrain the exhibition of the etchings had been admitted, and the only question now was, whether the publishing of the catalogue of the prohibited etchings could be permitted. In this catalogue it was stated, that a *fac simile* autograph would be presented with the consent of her majesty; but such consent had not been obtained and the statement was an imposition on the public, and the court would therefore interfere, as it would in the case of a manufacturer selling his goods under false representations. The plaintiff had a property in a series of works not published, or intended so to be, and it appeared that copies had been surreptitiously obtained. The defendant by his answer did not disclose the mode in which they were obtained, although he denied the knowledge of the fraudulent obtaining. The answer, therefore, had not met the case in the bill.

The question of property and of a breach of trust was involved in the present case. No doubt could be entertained as to the right of the owner in property in works of art,—the only question was, whether there had been any waiver of such right. In the case of publishing private letters, the sending them was alleged to be a waiver as was the public performance of dramatic compositions. In the case of *Abernethy's Lectures*, the property in them was alleged to be waived by their delivery in public. The original right was not denied in any of these cases. If there was any right of property in unpublished works it was exclusive, but in this case the defendant claimed to participate in such right although an entire stranger, and

Court of Chancery.—*Onyon v. Washbourn.*

that too, after having admitted the plaintiff's right to restrain the publication of the etchings. It was admitted that copies of the etchings could not be published, but how did the catalogue or description of them differ from a copy? Each conveyed information of the originals, and although the means were different, the effect was the same. The right to unpublished works did not depend on the law of copyright, but on the common law right in property. Thus Lord Hardwicke, in 1754, restrained the clerk of Sir John Strange from publishing an abridgment of his manuscript cases on the law of evidence. There could be no doubt of the plaintiff's title, and that the right had been invaded in an unauthorized manner by the defendant—the injunction of the court below must, therefore, be continued upon the common law right of property.

It could not be sustained upon the breach of trust disclosed on the pleadings, copies had only been given to a few private friends and the copies referred to in the catalogue could only have been obtained by a breach of trust. The case of *The Duke of Queensbury v. Shebbare*, 2 Eden, 329, before Lord Hardwicke, cited in *Millar v. Taylor*, 4 Burr. 2330, was against the right to publish upon an inspection of copies given by the plaintiff. The court must, in the absence of any explanation, therefore assume, as Lord Eldon did in the case of *Abernethy's Lectures*, 3 Law J., 209, that it was through a breach of trust. His Lordship then referred to *Tipping v. Clarke*, 2 Hare, 393, and to Sir James Wigram's judgment thereon, and also to the unreported case before Lord Eldon in 1830, of *Wyatt v. Wilson*, in which the publication of a picture of George the Fourth on his death bed was restrained: As to first sending the case to a court of law, the practice of this court was to protect property of this nature from any injurious invasion without the owner's consent. It had been urged, that the injunction of the court below was too extensive, including other etchings than those belonging to the plaintiff. But this objection was removed by the defendant having submitted to the injunction restraining the exhibition.

The appeal from the decision of the court below must therefore be dismissed with costs.

ONYON V. WASHBOURN.—25 January, 1849.

INJUNCTION—TRADE MARKS.

Injunction granted restraining the defendant from using labels, cards, handbills, &c., which were used for the purpose of leading the public to believe that the manufacture to which they related was made by the plaintiff.

Costs in the court below to be borne by plaintiff, as he had sought a too large injunction. Each party to pay their own in the appeal.

THE Vice-Chancellor of England had dissolved an injunction restraining the defendant from selling a composition called "waterproof

Court of Queen's Bench.—*Turrill v. Crawley.*

dubbing," and from using labels, cards, handbills, &c., similar to those the plaintiff used. It appeared that the plaintiff had, for a long time past, manufactured and sold the waterproof dubbing, and that the defendant had, by using the plaintiff's means of advertisement, led the public to believe that his (the defendant's) was the original manufacture.

J. Parker and *Lloyd*, for the appellant, from the order of the vice-chancellor.

Stuart and *Cooper*, for the respondent.

THE LORD CHANCELLOR having examined the defendant's labels, &c., said that they were clearly made with a view of misleading parties as to the dubbing sold, and at the same time of avoiding an injunction. That part of the injunction, therefore, relating to the labels, &c., which was refused by the vice-chancellor, would be granted. But as the plaintiff had sought, in the first instance, too large an injunction, he must bear the costs in the court below :—each party paying his own costs of the appeal.

Court of Queen's Bench.

[Before the Four Judges]

TURRILL V. CRAWLEY.—26 January, 1849.

INNKEEPER'S LIEN ON CARRIAGE BROUGHT BY GUEST.

An innkeeper is not bound to inquire whether a carriage brought by a guest is his property or not, and has a lien on it, though it should turn out to have been hired.

TROVER by a coachmaker against an innkeeper for a carriage. Plea, that the plaintiff was not possessed of the carriage as his own property at the time, &c. It appeared that a Miss Jerdan had brought the carriage in question to the defendant's hotel at Norwood, and left without paying her bill, and that the defendant detained the carriage in satisfaction of the amount of the bill. The bill contained a charge for the standing and cleaning of this carriage; and it turned out that the period for which it was hired to Miss Jerdan had not expired when the defendant first claimed to detain the carriage, but had elapsed before action brought. A verdict having been found for the defendant, a rule was granted on behalf of the plaintiff, to show cause why the verdict should not be set aside and entered for the plaintiff, on the ground that an innkeeper's right of lien did not extend to a carriage not the property of his guest, though in his possession.

Whateley and *Hance* argued the rule for the plaintiff; and

Court of Queen's Bench.—Boosey v. Davison.

Martin and Hayes, for the defendant.

LORD DENMAN, C. J., and PATTESON, J., said, they thought it unnecessary in this case to determine the general question whether an innkeeper had a right to detain any particular article in the possession of a guest, until the whole bill incurred by the guest was discharged; but they were clearly of opinion that the defendant had a lien on the carriage for house-room and care, and that as the amount of the claim for these was not tendered before action, the plaintiff was not entitled to recover. As the lien existed when the alleged conversion took place, the owner of the carriage could not be permitted to say it had come to an end.

COLERIDGE, J., and WIGHTMAN, J., said, they agreed with Lord Denman and Patteson, J., and added, that whatever doubts might formerly have existed, it must now be taken as settled law, that an innkeeper's right of lien attached as well to goods of a third person in the possession of a guest, as to the goods actually belonging to a guest. They cited *Robinson v. Wall*, (2 Bulstr. 269, and 1 Roll's Rep. 449; and *Johns v. Hill*, 3 Stark. 172. The rule to set the verdict aside was, therefore, discharged.

BOOSEY v. DAVISON.—31 January, 1849.

COPYRIGHT IN THE WORKS OF A FOREIGN AUTHOR NOT PUBLISHED ABROAD.

IN an action to recover damages for the infringement of the plaintiff's copyright in certain airs contained in Bellini's opera *La Sonnambula*, the question intended to be tried was, whether a party could have a copyright in this country of the works of a foreign author published here, which had not been previously published abroad, and the plaintiff had a verdict in accordance with the decision of the Court of Common Pleas in a case of *Cocks v. Purday*.

A rule was afterwards obtained to show cause why the verdict should not be set aside on the ground that evidence was improperly rejected, but, upon consideration the court was of opinion that there had been no failure of justice in this respect, and that no evidence had been rejected which was material to the merits of the cause. The rule for a new trial was therefore discharged.

Common Pleas.—Fish v. Kempton.

Common Pleas.

FISH v. KEMPTON.—15 April, 1849.

SET-OFF AGAINST A FACTOR.

A debt due from a factor cannot be set-off by a purchaser of goods from the factor, where such purchaser had notice of the sale being made as agent, though the name of the principal was not stated.

THIS was an action for goods sold and delivered, with a count for detainue. The question was, whether the defendant could set-off a debt due to him from the factors of the plaintiff, who had become bankrupt. At the trial the jury had found a verdict for the plaintiff, on the ground that the goods were sold to the defendant by the bankrupt as factors, and that the defendant was aware that they were so, though he did not know who were the principals.

Byles, Sergt., moved to set aside the verdict.

By the Court.—Though a factor has sold goods in his own name, yet the owner must be deemed the party dealt with, unless the goods were placed in the factor's hands in a manner which would induce others to believe they were his own property. Where the purchaser had information that the goods were sold in the character of agent, the buyer could not set-off the bad debt of the agent against the owner's demand. The verdict, therefore, must not be disturbed.

MURRAY v. HALL.—14 February, 1849.

TRESPASS—TENANTS IN COMMON.

One tenant in common can maintain an action of trespass against another tenant in common. Trespass will lie where ejectment can be maintained.

THE plaintiff brought an action of trespass against the defendant for breaking into and entering his house, and ejecting him therefrom, to which the defendant pleaded a denial of the plaintiff's possession. The plaintiff and defendant, it appeared from the evidence given at the trial, were tenants in common of the house. The plaintiff, therefore, obtained a verdict, with 3*l.* damages. A rule had been obtained calling on the plaintiff to show cause why the verdict should not be set aside, and a nonsuit entered, on the ground that one tenant in common could not maintain an action of trespass against the other.

By the Court.—Notwithstanding the case of *Cubitt v. Porter*, 8 B. & C. 257, and the opinion of *Littledale, J.*, therein, we think trespass will lie where ejectment does, and it may be sustained where there has been an actual ouster. The rule *nisi* must, therefore, be discharged.

THE
New-York Legal Observer.

VOL. VII.]

NEW-YORK, AUGUST, 1849.

[MONTHLY PART.]

THE CONTRACT OF ENDORSEMENT.

THE Court of Appeals, in deciding the case of the *Cayuga County Bank v. Warden & Griswold*, (7 N. Y. Leg. Obs. 114,) appears to have overlooked the fact, that the undertaking of an endorser is a special and conditional contract, dependant on certain acts to be done by the holder, and to have decided the cause on the ground of equitable notices, as a case between conflicting claimants. On no other principle could the question of knowledge on the part of the endorsers as to whether the note was paid at maturity become material. There are, undoubtedly, many cases, where the *bond fides* of a transaction is in controversy, or where there are conflicting claims by way of liens or encumbrances between different individuals, in which the knowledge of the respective parties as to the facts of the case becomes a legitimate and appropriate subject of inquiry. But that has no application to contracts, and does not tend to illustrate the fact whether those acts have been performed on the part of the holder of a promissory note which are a condition precedent to his right to recover against the endorser. For if the holder's right to recover depended on the knowledge of the endorser, as to whether the note had been paid at maturity, a personal service of the notice of protest would be necessary in every instance to charge him, unless that knowledge was brought home to him in some other way, in which case, no notice of presentment and non-payment would be necessary. That such is not the rule is well established by authority. Chitty says, "it is sufficient in all cases to send notices by post, properly directed, even though the letter *should miscarry*." (Chitty on Bills, 502, 3.) And where the parties reside in the same town or city, the notice may be left at the dwelling-house or place of business of the party to be charged, *in his absence*. (*Ireland v. Kip*, 11 Johns. R. 231.) The fact that personal service of the notice of dishonor is not necessary, is conclusive on the question that the holder's rights do not depend on the knowledge of the endorser, or "the information conveyed to his mind by the notice." But the point has been repeatedly passed upon and adjudicated both in this country and in England. In *Esdaile and others v. Sowerby & Miller*, (11 East, 114,) Lord Ellenborough said, "as to knowledge of the disho-

The Contract of Endorsement.

nor by the person to be charged in the bill, being equivalent to due notice of it given him by the holder, the case of *Nicholson v. Gouthet*, (2 H. B. 609,) is so decisive an authority against that doctrine, that we cannot enter again into the discussion of it;" and to the same effect are the cases of *Fee v. Hawkins*, 8 Taunt. 92; *Staples v. Okenes*, 1 Esp. R. 332; *Clegg et al. v. Cotton*, 3 B. & P. 239; *Baker v. Birch*, 3 Camp. 107; *Jackson v. Richards*, 2 Caines, 343; *Chanoine v. Fowler*, 3 Wend. 178, 9; and the case of the *Cayuga County Bank v. Dill*, 5 Hill, 403.* Rights and liabilities are reciprocal; and if the holder's

* Judge Cowen, in his dissenting opinion in the case of the *Cayuga County Bank v. Dill*, says—"The complaint of the present defendant is shortly this—'you failed to give me notice of what I knew all about, and informed you myself; in consequence of which I have been kept in the dark, delayed, and finally lost my remedy over against my principal.'” If the object of the judge was to caricature the defendant's argument, the statement was, perhaps, well enough; but it is far from being correct. There is point, however, in thus stating the question, incorrect as it is, as it affords a test for ascertaining the terms and conditions of the contract. The argument and position of the defendant was this: "I did not promise to pay you the amount of the note in question on condition that 'you failed to give me notice of what I knew all about'—such were *not* the terms of the contract. I put my intelligence in competition with no one, nor am I under any obligation to pay you a sum of money if it shall be thought that on a given subject I did or did not know more than you. I have made no such contract with you. The contract which I did make with you was a conditional one, by the terms of which I promised to pay you a certain sum of money on the happening of certain contingencies, and if they did happen, *then*, on the *further condition*, that *you performed certain acts*; you have *not performed those acts*, and I am, therefore, under no obligation to pay you, and it is none of your concern, or that of any other person's, and *least of all* of the court's, whose *sole and only duty* is to decide whether those contingencies have happened and *those acts have been performed by you*, whether I have or have not been kept in the dark, or whether I have or have not been delayed, or whether I have or have not lost my remedy over against my principal; those are questions with which you and the court have nothing to do." And so the court decided, and rendered judgment for the defendant, notwithstanding "he called at the plaintiff's bank the day on which the note fell due, and stated to the cashier that the note had *come round*, and asked him if it could not be renewed on paying \$100 and the discount, and that the maker was absent, and the note would have to lie over till his return, which would be in a few days; and on leaving the bank met one of the directors, who was also the president, to whom he repeated what he had said to the cashier, and adding that on the maker's return \$100 *should be paid, and the note renewed.*"

So in the case against *Warden & Griswold*, the defendants did not agree to pay the note if the plaintiff's notary *would make a mistake in describing it*, in the notice of protest.

Dill never contended that he was kept in the dark, or delayed, or that the failure of the plaintiff to give him notice operated to his injury, but on the contrary thereof, that it benefited him, and he insisted on his legal right to avail himself of that benefit, and that the courts ought not to deprive him of it.

With such "certainty and accuracy were the rights of parties on commercial paper" formerly "defined," that the drawer and endorser were *always discharged on the contract*, if the holder did not perform the condition precedent, on his part, of presentment, and giving notice of dishonor. And where actions were maintained against the drawer, who had drawn the bill without funds in the hands of the drawee, or against the endorser who had taken an assignment from the maker, where the holder had not performed those conditions precedent to his right to recover, they were *always maintained on the common counts, and never on the contract*; against the former on the ground of *fraud*, and against the latter for *money had and received*. *Baker v. Birch*, 3 Campb. 107; *Clegg v. Cotton*, 3 B. & P. 239; *Lafitte v. Slatter*, 6 Bing. 623. The doctrine of entering into the reasons why the holder need not perform the conditions precedent on his part, according to the terms of the written contract, by showing that the drawer had no funds in the hands of the drawee, or had withdrawn them since the making of the bill, or that the endorser had taken an assignment from the maker, or was the principal, or a guarantor, thus giving a different legal interpretation to the agreement from the writing itself, by attaching those reasons to and making them part of the original contract, is a modern invention, not supported by the old cases. In *Bickerdike v. Bollman*, 1 Term R. 405, the action was *not on the bill*, and the only question presented in that case was, whether the

The Contract of Endorsement.

rights to recover against the endorser does not depend on the information conveyed to his mind by the notice of protest, the liability of the endorser does not depend upon it. The rights of the holder and the liability of the endorser must be measured and ascertained by the same rule. The question is not what the endorser knows, or is bound to know, *but what has the holder done*. The endorser is *not bound to know any thing*, nor is the holder obliged to show that he was ever informed of the presentment and non-payment of the note. What, then, is the contract of endorsement, and what facts must the holder show in order to charge the endorser of a promissory note? The undertaking of the endorser is, that if the holder will present the note for payment at maturity, and it is not paid by the maker, he will pay it, *if the holder will make out a notice containing, in the language of Story, "a true description of the bill," or in the words of Thompson, "a complete specification of it," and that it has been presented for payment and dishonored by the maker, and deposit such notice in the post-office, properly directed, if the parties do not reside in the same town or city, and if they do, then to leave it at the dwelling-house or place of business of the endorser, if absent, and if not, to deliver the same to him personally, or state the same facts to him verbally*. The question of knowledge has nothing to do with the rights of the one or the liabilities of the other; and the holder can no more resort to accessory surrounding facts in order to aid or help out a defective notice than the endorser can to defeat a perfect one. The question is upon the acts of the holder and not on the mind of the endorser.

The contract of endorsement, however, as defined by the court of appeals, is very different from the one above mentioned. It cannot be drawn out and reduced to writing in much fewer words than those employed by the court in delivering the opinion on deciding the case of the *Bank v. Warden & Griswold*. If it is a *six hundred dollar note*, endorsed by two individuals *jointly*, who are *not partners*, and is payable at a particular place, the undertaking of the endorser is defined in substance as follows:—*If the holder will present the note for payment at maturity, and it is not paid by the maker, and will make out a notice describing the note as a three hundred dollar note, endorsed by them severally and not jointly, and stating that such a note had been protested for non-payment, and serve such a notice on them respectively, they will pay the note, if the holder has no other note or notes against the same maker endorsed by them, provided the court shall think such notice, when received, conveyed to their minds information of the identical note dishonored, but if they endorse other notes for the same maker, then they will pay the six hundred dollar note, only on condition that the holder make out a notice describing that note, and stating that*

want of notice extinguished the original indebtedness which existed prior to the drawing of the bill. See *Bronson, J., in Spies v. Gilmore*, 1 Com. R. 324, and the cases referred to by him; also *Hoare v. Graham*, 3 Camp. 57; *Rowson v. Walker*, 1 Stark. 361; *Mosely v. Hanford*, 10 B. & C. 729.

The Contract of Endorsement.

it had been presented for payment and dishonored by the maker, and properly serve *such a notice*. It is respectfully submitted that no such sliding scale can be used for the purpose of ascertaining the rights of the holders or the liabilities of the endorsers of promissory notes. It has neither the sanction of authority, nor the approval of common sense.*

In *Downer v. Remer*, 21 Wend. 10, the question submitted to the jury at the circuit was, "whether the notice of protest was sufficient to appraise the defendant of the dishonor of the note," and the jury found that it was. On a motion for a new trial, Bronson, Judge, said, "the note with the interest added was misdescribed *by mistake* in the notice of protest, as amounting to \$999 52 instead of \$599 52, but in *all* other respects it was *accurately described*, and it was the *only note* in the bank with the defendant's name upon it. The jury were well warranted in finding that the defendant was not misled by the error, and if not misled the notice was sufficient," and a new trial was denied and judgment rendered against the endorser. On a writ of error brought on the judgment of the Supreme Court, to the Court of Errors, that court reversed the judgment of the court below, and held the ruling at the circuit wrong. 23 Wend. 620. In the case of *Downer v. Remer*, the *only* variance between the note described in the notice and the note produced was in *the amount* of the note as stated in the notice, whereas in the case of the Bank against Warden & Griswold, the note was not only misdescribed as to the amount, but also as to the character and relationship of the endorsers.† In

* On the argument of the cause of *Remer v. Downer*, in the court of errors, the defendant's counsel not only pressed on the attention of the court the cases of *Mills v. The Bank of the U. S.*, 11 Wheat. 431; *The Bank of Alexandria v. Swann*, 9 Peters, 33, and the previous decisions on the same subject in our own State, but he called in others to his aid, from other states, and particularly so the case of *Smith v. Whiting*, 12 Mass. R. 6; (as may be seen by reference to notes of argument taken by the senators present,) and they were all repudiated—intentionally so, as was fully understood at the time.

It has been said that the justices of the supreme court in the seventh judicial district, who decided the cause of the *Cayuga County Bank v. Warden & Griswold*, did not understand the point presented and passed upon in the case of *Remer v. Downer*. It would be strange if they did not. Judge Wells was the attorney who brought the suit for Downer against Remer, and who prepared the cause for argument; and Judge Maynard was at the time a member of the court, delivered a written opinion on the question, and voted for reversing the judgment rendered in the court below.

† In the case of *Downer v. Remer*, 21 Wend. 10, "the notice sent by the teller was produced in court, and three witnesses, on looking at it, testified that it stated the amount of the note which had been protested to be *nine hundred and ninety-nine dollars fifty-two cents*. The teller testified that he read the same *five hundred and ninety-nine dollars fifty-two cents*, being the principal and interest of the note; and that it was *so intended*, but said it might be read *nine hundred, &c.*; he, however, testified that at the time the note fell due, there was *no other note in the Chemung Canal Bank with the defendant's name upon it*." In that case the person who wrote the notice testified that it read *five hundred dollars, &c.*, and was so intended. It was then capable of being so read, and Remer, who was on no other note at the bank, "on the receipt of the notice," unquestionably understood it, yet, the court of errors rendered judgment for the defendant, on the ground of variance between the note produced and the note described in the notice of protest, notwithstanding that the jury found as a *question of fact* that the notice was *sufficient* to appraise the defendant of the dishonor of the note; whereas in the case of *Warden & Griswold at the suit of the Cayuga County Bank*, there was no dispute as to the reading of the notice; it *could be read only one way*—it stated affirmatively and positively that the note protested was a *three hundred dollar note*; and it was written out in full, in a plain, bold, and legible hand.

The Contract of Endorsement.

Remer v. Downer, the court of errors established a rule by which the sufficiency of the notice of protest could be ascertained with the same certainty and correctness that a mechanic can ascertain the length and breadth of a particular surface; and as the latter is ascertained by comparing it with the rule, so the sufficiency of the former was to be ascertained by comparing the note produced with the description contained in the notice of protest. No reasons are assigned by the court of appeals for departing from so salutary and certain a rule; nor is any attempt made to distinguish the case of the *Cayuga County Bank* against *Warden & Griswold* from the one of *Remer v. Downer*; nor is it pretended that the notice of protest described the note produced at the trial; nor can such a position be maintained, until it shall be judicially determined that a *three hundred dollar note* is a *six hundred dollar note*, and that a note endorsed by two jointly, is an individual and *not* a joint endorsement. Were it not for the fact that it appears from the reporter's notes, (1 Comstock's R. 416,) that the case of *Remer v. Downer* was "cited" on the argument, it would be fair to presume from the published opinion that it was not referred to, or pressed upon the attention of the court in any way whatsoever. This abandonment by the court of appeals of the rule established by the court of errors in *Remer v. Downer*, for ascertaining the sufficiency of the notice of protest by comparing the note produced at the trial with the description contained in the notice, and substituting therefor the supposed information conveyed by it to the mind of the endorser, will produce confusion and uncertainty in relation to those commercial transactions where fixed and certain rules should be established by the courts, and will require considerable time, and occasion much difficulty before it is got rid of, yet, the criticisms of the bar—the repugnance of inferior courts to being governed by it—the uncertainty of the rule—the difficulty of applying it to particular cases, and the utter impossibility of ascertaining whether the knowledge of the endorser is the result of the right *mixture* of the proper proportions of "accessary facts," and information derived from the notice of protest—the consciousness that the decision in the particular case under consideration relieved the plaintiffs from a plain and palpable "mistake"—the accumulated pressure of others to be released from like errors, and the fact that the case itself stands upon no principle, will eventually compel the court to return to the rule from which it has departed, and to abandon the effort to regulate the rights and liabilities of parties by the supposed equities of each particular case instead of the legal terms and conditions of the contract.

LEGES.

•• Our readers will see by reference to the case of *Dole v. Gold*, reported in this number, that Mr. Justice Mullet, of the eighth judicial circuit, has given an opinion at variance with the decision in the case of the *Cayuga County Bank v. Warden & Griswold*, referred to in the above article.

U. S. District Court.—Skolfield v. Potter.

H. S. District Court.

[Maine District.]

IN ADMIRALTY.

Before the Honorable ASHER WARE, District Judge.

SKOLFIELD, *libellant* v. POTTER *et al*, 9th June, 1849.

When a vessel is let to the master to be employed by him, and he to pay to the owners a certain portion of her earnings, the owners will be liable to the seamen for their wages, though by the agreement the master is to have the entire control of the vessel—to victual and man, and furnish supplies at his own expense, unless at the time of shipping, this contract is made known to them, and they are informed that they are to look to the master as the only owner. The money that is paid over by the master, is paid as freight, and the owners as receivers, and having an interest in the freight, are liable to seamen for the wages.

The freight is hypothecated for the wages, and every part of the freight is liable for the whole wages. The owners, who have received freight under such a contract with the master, are liable for wages to the full amount of the freight in their hands, and not merely *pro rata* in proportion to what they have received.

The merchandise is bound to the ship for the freight, and the freight to the seamen for their wages.

When the owners of the ship are also the owners of the cargo, the cargo owes freight to the ship, and this freight is pledged for the wages.

The decision in the case of *Poland vs. The Spartan*, reviewed and affirmed.

THIS was a libel *in personam* against the owners of the schooner *Arrowsic*, for seamen's wages. The libellant shipped at the port of Bath, as mate, on the 22d of September, 1848, on a general trading voyage, and continued on board, and did duty, as mate of the vessel, in several voyages, two of which were to foreign ports, until the return of the vessel to Bath, on the second of May following. On his discharge, the master delivered to him a barrel of flour, part of the cargo belonging to the owners, and gave him an order on the owners for the balance of his wages due, amounting to \$128, including the flour. The owners paid him \$25 on the presentment of the order, and promised to pay him the residue in a few days. But after calling on them several times, and being put off from time to time, he sued out a libel. The owners, in their answer, not denying that the services have been rendered, set forth a defensive allegation, denying their liabilities for the wages. The defence relied upon, is, that the vessel was let to the master on a verbal agreement that he was to have the use and control of the vessel, to employ her as he should choose—he to victual and man her at his own charge, and to pay them for the use and charter of the vessel, one half of her gross earnings, deducting one half of port charges. It was contended, that having by this contract parted with the possession or control of the vessel, the master became owner for the voyage, or the term during which the master employed her under this contract, and as such was exclusively liable for supplies and seamen's wages, and that they, as the general owners, were exempted from all liabilities from these charges.

U. S. District Court—Skolfield v. Potter.

J. M. Adams, for the libellant.

P. Barnes, for the respondents.

WARE, District Judge.—It is admitted in this case, that the services have been performed, and that wages are due. Some question was made on the evidence as to the balance that remains unpaid. Two charges of ten dollars each, made by the master for money advanced before the termination of the service are objected to by the libellant. To prove these, the master produced his memorandum book, in which these sums were charged; and this, with his supplementary oath, would be sufficient as *prima facie* evidence, even if the suit were against the master himself. They stand charged in the same book, which contains all the other charges, which are not objected to, and which agree with the account kept by the libellant himself. They are the two last charges in the account, and at the time of his discharge, the parties came to a settlement, and a draft or order was given and accepted by the mate for the balance found due. In this settlement these sums were allowed, and it appears without objection at the time. I see no objection to their allowance now.

The important question in the case, is, however, whether the respondents are liable for the wages. The schooner was let by a parol contract, by which the master, as hirer, was to have the possession and control of the vessel—was to navigate, to victual and man her at his own charge, and employ her in such business as he should choose, and to render to the owners for the use of the vessel, one half of her earnings. It was objected at the argument that it was not competent to a party to prove such a lease of a vessel by parol evidence, at least to affect the rights of third persons. It is true that by the general maritime law, it is held that the title to vessels must be shown by writing, *The Sisters v. Robison*, 159, and the contract of letting and hiring also should regularly be, and usually is, proved by a charter party in writing. But it has been held by a variety of decisions in this country, that such a parol lease is valid not only between the parties, but to conclude the rights of third persons, who are strangers to it.

It seems also to be settled by the general current of the decisions, that under a letting of the vessel herself, whether by a written charter or parol contract, when the possession of the vessel is transferred to the hirer, and he appoints the master and crew, and sails her at his own expense, and has the entire control, that he is to be considered, with respect to third persons contracting with the master, as the owner, and that he succeeds to all the rights and liabilities of the owners. The general owners or proprietors have then no lien on the merchandise for freight, nor are they personally liable for supplies furnished to the vessel on the contract of the master, but the hirer is substituted in their place, both as to their rights and liabilities. 3 Kent's Com. 136. Conklin's Jurisdiction, Law and Practice of the Admiralty, 135. Nor does it make any difference, according to the

 U. S. District Court.—*Sholfield v. Potter.*

decisions, though the charterer goes himself as master. *Boeve v. Davis*, 1 Adol. & Ellis, 135, 23 E. C. L. R. 95. The cases in this country go further, and decide when a vessel is taken by the master on the terms that this was, and he is to have the control, and direct the employment of her, and the earnings to be divided between him and the owners; that this is to be considered as a lease or charter of the vessel. The master is held, under such an agreement, to be the special owner, and the general owners not liable on his contracts for supplies furnished the vessel while thus employed. *Taggard v. Loring*, 16 Mass. R. 336. *Emery v. Hersey* 4 Greenl. 407. *Thompson v. Hamilton*, 12 Pick. 425. *Cutler v. Thurlow*, 20 Maine, 213. *Thompson v. Snow*, 4 Greenleaf, 264. *Cutler v. Winsor*, 5 Pick. 335.

But it is evident, when the owners put their vessel into the possession of the master on such terms, that the contract is of a mixed and somewhat ambiguous character. In one aspect, it may be considered as a charter of the vessel, and this as a mode adapted to determine the amount of the charter or hire to be paid. Viewed in another light, it partakes of the nature of a partnership, in which one partner furnishes the capital and the other contributes his time and labor in the transaction of the business, and the profits to be divided. In a third view, it may be considered as a contract of hiring of the master, he to receive a share of the earnings of the vessel, instead of a certain and stipulated sum for his wages. In the various cases in which the subject has been brought before the courts for adjudication, it has been presented in these various lights; and without any great violation of legal analogies or legal principles, the contract may be considered as belonging to one class or the other. In a case before Lord Ellenborough, (*Dry v. Boswell*, 1 Camp. 329,) the evidence first offered, being that the owners and master were to share equally in the profits, he declared that it was a partnership adventure, and that the master and owners were liable as copartners; a joint participation of profit and loss constituting a partnership; and when on further evidence, it appeared that the master was to have a share of the gross earnings, and not to be liable for losses, he pronounced it to be a contract of hiring of the master by the owners, and that this was only a mode of determining the amount of his wages. Generally, however, the courts have considered the contract as a charter of the vessel, and the master as owner for the voyage; and as a corollary from this decision, it is held that the general owners are not liable for the master's contracts for supplies and repairs in the course of the voyage.

But though this is the general language of the authorities, there are exceptions. The case of *Rich v. Coe*, Cowper, 636, is a strong decision the other way. Lord Mansfield, in delivering the unanimous opinion of the court in that case, observed, that whoever furnished supplies to a vessel on a contract made by the master, has a three-fold security: 1. The person of the master; 2. The specific ship; 3. The personal liability of the owners;—and he added, that it makes no difference in the liability of the owners, that there is a private

U. S. District Court.—Skolfield v. Potter.

agreement between them and the master, by which he is to furnish the supplies and keep the ship in repair, unless the creditor has notice of the contract, and gives credit to the master individually.* The doctrine of Lord Mansfield seems to have been entirely satisfactory to Mr. Justice Story, for in his treatise on *Agency*, § 298, he states the law nearly in the words of this great master of maritime law, though the more recent decisions, which seem materially to qualify, if they do not directly overrule the doctrine, must have been quite familiar to his mind. Indeed, with respect to some of them, he has on other occasions not hesitated to express his doubts in very pointed terms. *Arthur v. The Cassius*, Story's Rep. 93; *The Nathaniel Hooper*, 3 Sum. R. 577—and Chancellor Kent, though he seems to have yielded to the authority of the later decisions, expresses his own opinion in terms very nearly, if not entirely, agreeing with the doctrine of Lord Mansfield. "To whom was the credit given, seems to be the true ground on which the question ought to stand." 3 Com. 135.

Now, if this contract between the hirer and the owners is not known, the supplies are always furnished on the personal credit of the owners, as well as on that of the master. In the opinion, therefore, of Chancellor Kent, as well as of Judge Story and Lord Mansfield, although the owners have let their ship by a charter party, under which the master, if he is the hirer, is bound to bear all the expenses of supplies, they ought to be held bound to third persons on the master's contracts, which fall within the scope of his ordinary authority as master, unless this private agreement is made known; for if it is not, supplies are always furnished on the credit of the owners. The owners, by putting the master in possession of the vessel, hold him out to all who are ignorant of the special contract, or at least enable him to hold himself out as authorized to bind them personally, by all contracts relating to the usual employment of the vessel. And if any one must suffer from his acts it is more reasonable that the loss should fall on them than on strangers, who have given him credit on the ground of his official character.

It is admitted, however, that the current of judicial decisions is in favor of exempting the owners from their liability for ordinary supplies, while the vessel is employed under such a contract. But no decision has yet gone so far as to relieve them from their liability for seamen's wages. *Curtis' Rights and Duties of Seamen*, p. 336. The seamen have always this triple security, besides a direct hypothecary interest in the freight; and in all ages of the maritime law, their claim for wages has been highly favored, both on the ground of general commercial policy, and from the consideration of their own habits of carelessness and characteristic improvidence. They habitually enter into their engagements in reliance on these securities, and they ought not, on principles of public policy and natural justice, to be de-

* In the case of *Reeve v. Davis*, 1 Adol. & Ellis, which seems directly to overrule this decision, the case itself was not referred to, either by the counsel or the court.

U. S. District Court.—Skolfield v. Potter.

prived of them by any refined and subtle distinctions of law, which are so alien from all their habits of thought and action.

This form of contract, of letting vessels to the master to be employed on shares has become very common in this part of the country, especially with respect to small vessels employed in the coasting trade. The master to whom the vessel is intrusted by the owners, is usually an enterprising and industrious young man, but ordinarily of limited pecuniary responsibility; for as soon as he acquires sufficient capital or credit, he becomes a part owner himself. These contracts are almost invariably by parol, and the terms are settled by a well understood usage. The master, under the usage, is to bear the whole expense of victualling and manning her. The port charges in the various ports visited, are first to be paid from the gross earnings of the vessel, and the balance of the freight is to be divided in equal shares between the master and owners. The seamen often, and perhaps usually, have no knowledge of this private contract between the master and owners, and they engage their services in reliance upon the ordinary security, which the general marine law gives them. It is admitted that the weight of the authorities is in favor of exempting the owners from their liability for ordinary supplies, while the vessel is employed under such a contract.

If this mode of letting the ship to the master to be employed on shares, relieves the owners from their liability for wages, the contract will operate on the seamen, probably, in the great majority of instances as a perfect surprise. After the termination of his service, he finds one part, and an important part, of his security, the personal liability of the owner, is gone, under a private contract unknown to him; and that of the master may be, and often will be, worthless. There remain, it is true, the freight and the vessel, but the freight is received from time to time, and there may be, and usually is, little remaining due at the end of his service. The ship is indeed an ample security. But since the act of March 3, 1847, ch. 55, respecting costs in admiralty proceedings *in rem.*, by which all costs are denied to the libellant, except for the payment of witnesses, unless he recovers more than one hundred dollars, the remedy against the vessel for all useful purposes is taken away, when the suit is for less than the sum named. And in these coasting and trading voyages, the balance of wages will rarely amount to so much as one hundred dollars. The consequence will be, that practically the seamen will have for their security nothing beyond the personal liability of the master.

No judicial decision has yet extended this modern doctrine so as to deprive the seamen of their ancient right of recourse against the owners. The whole doctrine in the cases to which it has been applied, is not free from difficulties on the principles of our law, except with the limitation mentioned by Lord Mansfield, that the creditor is notified of the non-liability of the owners at the time the credit is given. Because, when he contracts with the master, he has always a right to believe that he is contracting with the owners, if he is not advised to the contrary. If he is informed, and then gives credit, he

U. S. District Court.—Skotfield v. Potter.

knows to what security he trusts. To extend the principle so as to bar the right of the seamen, would be repugnant to the general spirit of the maritime law, which has studiously provided in their favor the greatest security for their wages. I am unwilling to be the first judge to give it that extension. Indeed, the original doctrine of Lord Mansfield, appears to me to be the most just, and most in harmony with the general principles of our law. The master, by the known rules of law, represents the owners as their agent, and is authorized to bind them by all contracts relating to the usual employment of the ship. The seamen enter into their engagements with the full confidence that the owners are bound for their wages. If it must be admitted that the decision of Lord Mansfield is overruled by the later decisions, these go no farther than to exempt the owners from their liability for supplies furnished by men who are in the habit of looking well to their securities. Rather than extend these decisions by analogy, to the claims of the crew, unless I can clearly see that on principle the owners are exonerated, I am ready to say, *Malo cum Platone errare*—I will not add, *quam cum ceteris vera sentire*—but sooner than follow the analogies of decisions, the soundness of which is so questionable, and carry them out, to the exclusion of the seamen from their recourse against the owners, unless at the time of their engagement they are plainly told that they are to look to the master as the only owner. The concealment of a fact of such importance, is a fraud on the men.

But I do not put the decision of the case on this ground alone. There is another on which I think the owners are bound for the wages.

By the ancient maritime law, the title of seamen to wages, is made to depend on the issue of the adventure, for which they are engaged. Unlike other contracts of hiring, their right to compensation does not depend alone on the fidelity and skill with which they perform the services for which they engage; but with whatever perseverance and courage they exert themselves, their right to compensation is suspended on contingencies, which may affect the ultimate result of the voyage; it is made dependent on what has been termed the fortune of the vessel. What, then, is this fortune to which the seamen must look? The ship, says Emerigon, in the condition in which she was at the time of her departure from the port of outfit, together with all the freight which is gained in the course of the voyage, form that fortune of the vessel which constitutes the pledge to the seamen for their wages. *Traité des Assurances*, ch. 17, sec. 11. The privileged hypothecation, then, he adds, allowed to the mariners, comprehends every part of the ship and every part of the freight, according to the nature of hypothecation, which is *tota in toto et—tota in qualibet parte*. Their privileged line is entire over the whole, and is entire in every part. The ship and the freight, with respect to wages, form one mass, and all that remains of either, at the end of the voyage, is pledged for their payment. The contract of the mariners, Emerigon goes on to say, is a species of copartnership. It is not, indeed, a partnership as to all the effects of that contract, but as to some of its consequences;

U. S. District Court—Skidfield v. Potter.

for the seamen have no claim to a remuneration, but to the extent of the effects embarked in the enterprise, which they bring home. If all is lost, the mariners lose their wages, and they cannot then enforce the payment by a personal action against the master or owners. But if all is not lost, whatever remains of the ship or freight, is specifically pledged for their payment. Freight earned and put ashore, is saved from the effect of a supervening shipwreck, by which all that remains is lost. It is a partnership fund, that has entered the common chest, and is hypothecated to the seamen for their wages.

It is now more than twenty years since I was first called upon to examine this right of the seamen to claim their wages out of the earnings of the vessel. It was in the very ably contested case of *Poland v. The Spartan*, Ware's Rep. 145-6. In that case, it was held, that when goods of the owners themselves are shipped, they owed freight to the vessel; and though no stipulated freight could be agreed, that the seamen could proceed against the goods in specie, to enforce their rights to the amount of a reasonable freight, to be determined *boni viri arbitrio*. I am not ignorant that the doctrine was then considered by some of the profession as somewhat startling, for its supposed novelty and boldness. But after ample time to review and consider the subject, I have seen no reason to retract or qualify the doctrine of that case. It is, in my judgment, a just and logical deduction from the peculiar character given by the law to the seamen's contract; and is supported by the highest authority in the maritime law. The owners, says Emerigon, who are shippers in their own vessel, have two qualities which ought not to be confounded. In quality of shippers, they owe a freight to the ship herself; and in their quality of owners, the ship owes a freight to them; and he adds, this freight is pledged to the crew. *Des Assurances*, ch. 17, sec. 10, No. 2. It constitutes a part of that fortune of the vessel to which the crew are to look for their pay. To them, it makes no difference who owns the cargo. So far as they are interested, there is a freight earned, and to the amount of their wages, it belongs to them.

I am aware of the dictum in the case of *Sheppard v. Taylor*, 5 Peters' Rep. 712, that "the cargo is not in any manner hypothecated or subjected to the claim of wages." This was but a dictum, and the point was not necessarily involved in the cause. It may be true that the cargo is not directly, but it certainly is indirectly bound for the wages. For it is a first principle of the maritime law that the cargo is bound to the vessel for the freight, and another equally ancient and undoubted, that the freight is pledged for the wages. Indirectly, therefore, to the amount of the freight due upon it the cargo is bound for the wages. The master is not obliged to deliver it until the freight is paid or secured, and if not paid he may sell so much as is necessary to pay the freight. The seamen may, therefore, indirectly through the master proceed against the cargo itself, for their wages to the amount of the freight due. When the owners of the ship are the owners of the cargo, the seamen's claim on the freight can be enforced in no other manner but through the merchandise; and I see

U. S. District Court.—Skellfield v. Potter.

no objection in principle or convenience in allowing the seamen to do that directly in their own name, which they may do indirectly through that of the master. Such was evidently the opinion of the English Court of Admiralty in the case of the *Lady Durham*, 3 Haggard, 196. The Court says that "a mariner has no lien on the cargo, *as cargo*. His lien is on the ship, and on the freight as appurtenant to the ship; and so far as the cargo is subject to freight he may attach it as a security for the freight that may be due." The doctrine maintained in the case of the *Spartan* seems also to have met the approbation of Judge Conkling. In his learned and valuable treatise on the *Law and Practice of the Admiralty*, p. 75-6, he says that "it is recommended by persuasive considerations of justice and supported by strong analogies in the undisputed principles of the maritime law."

It appears by the testimony of the master, who was examined as a witness in the case for the respondents, that he had paid over to them at different times \$600, and that on a cargo of lumber carried for them the freight was \$500, which has not been paid to him, but remains as part of the earnings of the vessel in their hands. In addition to this, the freight on the cargo brought home in the vessel on her return to Bath was received and collected by one of the owners, and is now in their hands.

Now, every dollar of this money was hypothecated to the seamen as soon as it was earned, for their wages. To the amount due to them it was their own hard earnings, and whoever received it *as freight*, received it subject to their claims. It is true, that when the master pays to a creditor the money which he receives as freight the seamen cannot follow it into the hands of such creditor. For it does not pass into his hands carrying with it the quality of freight. But to the owners in this case, it is paid over as part of the earnings of the vessel, that is as freight. It is said, indeed, that it is paid to them not as freight, but as charter or the hire of the vessel. But even admitting under this contract of hiring on shares, that the master is to be considered as the special owner, that the general owners as to contracts made by him with the seamen, as well as for supplies, are strangers to the vessel, and that that these payments made to them are to be held as payments of charter, and not as payments of part of the freight, there will still remain in their hands all the freight earned on her return voyage to Bath, and \$500 which they owe on the cargo of lumber. To this amount they have the earnings of the vessel in their hands, and the seamen might, in a suit against the master, have attached this as freight due.

It is said, that if the owners are held liable for the wages, on the ground that they have received freight, that they are liable only in proportion to the amount which they have in their possession, bears to the whole amount earned. But if the decision were to be put upon this ground alone, the consequence would not follow. The whole freight is hypothecated for the whole wages. And from the nature of the creditor's interest in the thing pledged, it is not subject to this division. Every part of the thing is pledged for every part of the debt,

U. S. District Court.—Skolfield v. Potter.

propter indivisam pignoris causam. Dig. 11, 2, 65. And therefore, if two things are pledged for one debt, and one chance to be lost or destroyed, the hypothecation or lien continues entire for the whole debt in that which remains. *Domat. Lois Civiles*, Liv. 3, tit. 1, sec. 1, No. 13; *Pothier De L'Hypothèque*, ch. 3, sec. 1; *Pittman v. Hooper*, 3 Sumner's Rep. 58.

But it seems to me, that the decision may more properly be put on a broader ground. Where the owners put their vessel into the hands of a master, to be employed by him on shares, I am prepared to hold as a just deduction from the principles and general policy of the maritime law, that they will continue liable to the seamen for their wages, notwithstanding the entire control of the vessel may be surrendered to the master, unless the seamen, at the time of their engagement, are notified that the master is to be considered as the sole owner, and that they are not to be liable. The rights of these seamen ought not to be affected by this private agreement between the master and owners. Even if the doctrine of the modern decisions is admitted, and the owners are held not liable to merchants who furnish supplies, there are strong objections to extending the principle to the contracts of seamen. They enter into their engagements, in the confidence that they have the usual and legal securities for their wages. One of these, to which a seaman habitually looks, is the personal liability of the owners. But in this case, there will be, in fact, no owner, and the only personal security they have is that of the master. Another reason is, the freight which is paid to them by the master, and is the proper fund for the payment of the wages. In the hands of the master, the whole of it is liable for them. But here the freight is from time to time paid over for the hire of the vessel, and only one half of it remains in his hands at the close of their service to respond for their claims. This private agreement between the owners and master, operates as a perfect surprise upon them. My opinion is, that they ought to be held as owners.

And further, in my judgment, they are liable for the wages as receivers of the freight. They have in their hands, according to the evidence, \$1100 of the earnings of the vessel, besides all the freight received on the cargo she brought home to Bath. The money that was paid over to them, was, by the very terms of their contract, paid as the ship's earnings, that is as freight. In its quality of freight, it is liable for wages, in whosoever hands it may be. It partakes too much of the character of subtlety to call it charter, or the hire of the vessel. It is more consistent with justice, and I think quite as much so with the analogies of the law, to leave to it the name, which the parties themselves have given it, and under that name the seamen have a right to receive their pay from it. If, indeed, the respondents were to be held liable simply as receivers of the freight, it might be necessary to amend the libel, by making the master a party, and then the services on them would operate as an attachment of the freight in their hands; and if I thought it necessary, I should not hesitate to allow an amendment to meet this posture of the case; but in my opinion it is not.

N. Y. Supreme Court.—Dole v. Gold.

Independent of all these considerations, my opinion is, that the respondents are liable on their express promise. When the libellant presented the order of the master, a part of it was paid, and a promise given to pay the residue. The libellant had a right to consider this as a distinct admission of their liability. If this order was to be considered as a piece of commercial paper, and the principles of the commercial law to be applied to it, they would be liable upon it as acceptors. For an acceptance may be by parol, or may be inferred from the conduct and acts of the party. (Story—Bills of Exchange, § 243.) In reliance on this promise, the libellant forebore to commence proceedings against the vessel or the master. It is now too late for the owners to deny their liability.

In every point of view, I think the libellant is entitled to a decree for his wages.

Wages decreed, \$103 12.

N. Y. Supreme Court.

[November General Term, Eighth District.]

[Before the Four Judges.]

BENJAMIN DOLE, Plaintiff in Error, v. CHARLES R. GOLD, Defendant in Error.

PROMISSORY NOTE—WHAT A SUFFICIENT NOTICE TO CHARGE ENDORSER.

A notice to the endorser of a promissory note must be sufficient on its face to charge him as the endorser, and cannot be aided or helped out by extrinsic facts.

Such notice must, in such language as the holder may choose to adopt, inform the endorser of the fact that the note has been duly presented for payment, and that the maker has refused or neglected to pay it.

ERROR to the Recorder's Court of the city of Buffalo, to review a judgment of that court affirming a judgment of a Justices' court.

The action before the justice was for the recovery of the money due on a promissory note made by Andrew Cole, payable to the order of Benjamin Dole and endorsed by him. Dole being served with process, appeared before the justice and plead the general issue. On the trial before the justice the plaintiff produced the note, proved the making and endorsing thereof, a demand of payment of the maker in due time, his refusal to pay, and that on the same day of the demand he caused a written notice to be served on Dole, the endorser, in the words following:

"Buffalo, Sept. 8th, 1847.

"Dear Sir: A note of \$22 50, made by Andrew Cole and payable to your order, and endorsed by you, is due this day, and has not

N. Y. Supreme Court.—*Dole v. Gold.*

been paid. You will therefore take notice that I am the owner and holder of said note, and look to you for the payment of the same.

"Yours, &c. C. R. GOLD."

And thereupon the plaintiff rested his case. The defendant, Dole, moved for a non-suit, on the ground that the notice was not sufficient to charge him as endorser; that is was defective in not stating that payment of the note had been demanded of the maker.

The justice refused the non-suit, and gave judgment for the plaintiff against Dole for the amount of the note, interest and costs. The judgment was taken to the Recorder's Court, by certiorari, and there affirmed. The judgment of the Recorder's Court is now brought here by writ of error. The only question made on the argument in this court, or presented by the case, relates to the sufficiency of the notice to the plaintiff in error, to charge him as endorser of the note made by Cole.

W. H. Greene, for plaintiff in error.

C. H. S. Williams, for defendant in error.

March Term, 1849. MULLETT, J., now delivered the opinion of the court:—The conditional nature of the endorsee's contract is not denied in this case, nor is it denied that to make the endorser liable, the holder of the note must prove on the trial, that the payment of the note was properly demanded of the maker, and refused or neglected by him; or, in other words, that the note was dishonored by the maker, and that the requisite notice was given to the endorser. The demand and non-payment were sufficiently proved before the justice, and the only question for our consideration relates to the sufficiency of the notice to the endorser. The notice was a written notice subscribed by Gold, the holder of the note, addressed to the endorser, dated and served the day the note became due, and stated that the note, describing it, was *due that day and had not been paid*, and that the subscriber was the owner and holder of the note, and looked to the endorser for the payment of the same. This presents the question whether it was necessary that the notice should inform the endorser that payment of the note had been demanded of the maker. In this state, the sufficiency of the notice, when there is no dispute about the facts, is a question of law to be determined by the court. *Vanhoesen v. Alstyn*, 3 Wend. 75; *The Bank of Utica v. Bender*, 21 Wend. 643; *Remer v. Downer*, 23 Wend. 620; *Ransom v. Mack*, 2 Hill, 687; *Spencer v. Bank of Salina*, 3 Hill, 520.

These decisions are in accordance with the English doctrine on the subject, as it was asserted by Buller, Justice, in the case of *Tindale v. Brown*, decided in 1786, (1 T. R. 169,) and generally maintained by the King's Bench ever since. For the more recent English decisions on this subject, see the chancellor's references in the case of *Remer v. Downer*, above cited. The same principle is adopted in several of the States. In Massachusetts, in the case of *Gilbert v. Dennis*,

N. Y. Supreme Court.—Dole v. Gold.

3 Met. 495; *Pinkham v. Macy*, 9 Met. R. 374. In Pennsylvania, in the case of *Beanzer v. Wightman*, 7 Watts & Sergt. 261. In Michigan, in the case of *Plate v. Drake*, 1 Doug. Mich. Rep. 296, and by the Supreme Court of the United States, in the cases of *The Bank of Columbia v. Lawrence*, 1 Peters' Rep. 578, Thompson, J., 582; *Rhet v. Poe*, 2 Howard's U. S. Rep. 457, Daniels, J., 480 to 481; *Harris v. Robinson*, 4 How. U. S. Rep. 336, Woodbury, J., 344 to 345.

This being the settled law, the question of the sufficiency of the notice cannot be avoided by the court, under any pretence of submitting it to a jury to say, whether the party could understand what was meant, or whether he was misled by it or not. It is true, there may be many facts connected with the question of proper diligence in giving notice, such as the residence of the parties, the course of communication between them, &c., which must be submitted to a jury, but the notice, however and whenever sent, must speak for itself. In a case like the one under consideration, there are no extrinsic facts for the jury to find, the notice was properly sent, and shows upon its face what information it gave the endorser, and the court must decide whether it is sufficient or not. The necessity of giving notice to the endorser, grows out of the legal construction of the obligation which he assumes by endorsing the note. Mr. Justice Story, in his *Treatise on Promissory Notes*, sec. 135, says: "The endorsement of a note, in contemplation of law, amounts to a contract on the part of the endorser, with and in favor of the endorsee, and every subsequent holder to whom the note is transferred. *First*. That the instrument itself and the antecedent signatures thereon are genuine. *Second*. That he, the endorser, has a good title to the instrument. *Third*. That he is competent to bind himself by the endorsement as endorser. *Fourth*. That the maker is competent to bind himself to the payment, and will, upon due presentment of the note, pay it at maturity. *Fifth*. That, if, when duly presented, it is not paid by the maker, he, the endorser, will, upon due and reasonable notice given to him of the dishonor, pay the same to the endorsee or holder. The terms of this contract impose upon the endorsee or holder an obligation to make an attempt to obtain payment from the maker, and to give notice of such attempt and its failure to the endorser, and the performance of this obligation is a condition precedent to the right of the holder to resort to the endorser for the payment of the note. Until the performance of this obligation on the part of the holder, the endorser's liability is *contingent*—upon the performance, it becomes *absolute*. One part of this condition precedent to be performed by the holder is the giving of the notice to the endorser. What must this notice contain? The requisites of the notice, that is, what information it must give to the endorser, must be prescribed by law, though the law requires no particular form of words in which that information must be conveyed. *Story on Bills of Exchange*, § 390; *Story on Promissory Notes*, § 348.

In his *Commentaries on the Law of Promissory Notes*, sec. 348, Mr. Justice Story says: "It is indispensable that the notice should

either expressly or by just and natural implication, contain in substance the following requisites :

"1st. A true description of the note, so as to ascertain its identity.

"2d. *An assertion that it has been duly presented to the maker at its maturity, and dishonored.*

"3d. That the holder or other person giving the notice, looks to the person to whom the notice is given, for payment and indemnity."

The second requisite is the only one in question in this case. The counsel for the defendant in error, insists that it is not necessary in the notice to the endorser, to inform him that payment of the note had been demanded of the maker, and relies principally upon the case of *Mills v. The Bank of the United States*, 11 Wheat. Rep. 431, to sustain that proposition. It is true, that some of the language of the learned judge, who delivered the opinion of the court in the case of *Mills v. The Bank of the United States*, disconnected from the subject matter of the case, would seem to favor the assumption of the defendant in error, but applied to the case then under consideration, the opinion merely decides that a notice to an endorser of a note, describing it as payable at a particular bank, on a certain day, and endorsed by him, had been *protested for non-payment*, was not fatally defective by reason of its not stating that payment was demanded at the bank when the note became due. See Ch. J. Shaw's review of the opinion in the case of *Mills v. The Bank of the United States*, 3 Met. Rep. 495.

But whatever may be considered as decided in the case of *Mills v. The Bank of the United States*, the opinion of the court was delivered by Mr. Justice Story, in February, 1826, and before the particular requisites of a notice to an endorser had been a subject of much judicial discussion. About this time the particular point now under consideration, became a subject of extensive litigation in the English courts, which occupied their attention for several years. In 1825, it was decided by the King's Bench, in *Hartly v. Case*, Abbott, C. J., delivering the opinion, that a notice from the holder of a bill of exchange to the endorser, in the following form, "I am desired to apply to you for the payment of the sum of £150, due to myself on a draft drawn by Mr. S. on Mr. Case, which I hope you will, on receipt, discharge, to prevent the necessity of law proceedings, which otherwise will immediately take place," was insufficient to charge the endorser, because it did not apprise the party of the fact of dishonor. The C. J. says, that no particular form of words is necessary in such a notice, but the *language used* must be such as to convey notice to the party what the bill is, and that payment of it has been refused by the acceptor. 4 Barn. & Cres. 339; S. C. Dowling & Ryland's Rep. 505; 10 Eng. Com. Law Rep. 350. About the same time the great case of *Solarte v. Palmer*, originated in the common pleas. Lord Tenterden, at nisi-pruis, instructed the jury that a letter from the attorney of the holders, addressed to the endorsers of a bill of exchange, in the following words, "Gentlemen—A bill for £683, drawn by Mr. Joseph Keats upon Messrs. Daniel, Jones & Co., and bearing your endorsement, has been put

into our hands by the holders, (naming them,) with directions to take legal measures for the recovery thereof, unless immediately paid to yours, &c.," was insufficient to charge the endorser, to which direction the plaintiff excepted. The bill of exceptions stated that the C. J. did then and there declare and deliver his opinion to the jury, that the letter was not a sufficient notice of the dishonor and non-payment of the bill of exchange to entitle the plaintiffs to maintain their action against the defendants, and that the jury thereupon gave a verdict for the defendants. The court, upon the bill of exceptions, having overruled the decision of the chief justice, and given judgment for the plaintiff, this judgment was taken into the Court of Exchequer Chamber by writ of error; and in A. D. 1231, was reversed by the unanimous concurrence of all the members of the court. The leading opinion on the reversal was delivered by Tindal, C. J., who sustained the nisi-pruis decision of Lord Tenterden, and, in his opinion, says—"The notice should at least inform the party to whom it is addressed, either in express terms or by necessary implication, that the bill has been dishonored. In this notice we think no such information is conveyed in terms, or is to be necessarily implied from its contents. It is perfectly consistent with this notice, that the bill has never been presented at all." 7 Bingham, 350; 20 Eng. Com. Law Rep. 226.

This case was appealed to the House of Lords, and decided there in 1834, upon which the judgment of the Court of Exchequer Chamber was affirmed. Park, J., delivering the leading opinion, says—"The letter of the plaintiff's attorneys did not amount to a notice of the dishonor of the bill, as such notice ought in express terms, or by necessary implication, to convey full information that the bill had been dishonored." Lord Brougham, C., concurred in the opinion, on the authority of *Harily v. Case*, the unanimous decision of the Exchequer Chamber, and the 5th edition of Bayly on Bills, and remarked, "that the case was too clear for an appeal." The decision of the House of Lords was concurred in by all the judges present, to wit: Williams, J., Bolland, B., Alderson, B., Patteson, J., Taunton, J., Littledale, J., Vaughan, J., and Gaselee, J. 1 Bing. N. C. 194; 27 Eng. Com. Law Rep. 351.

The next case in point of time is that of *Boulton v. Welch*, decided in the Common Pleas, in 1837. Park, J., at nisi-pruis, had decided that a notice from the holder to the endorser of a promissory note, describing the note by its amount, the maker's name, its date and the time of its payment, and stating that it was endorsed by him, and that "it became due yesterday, and was returned to him (the holder) unpaid," and requesting payment forthwith, was not sufficient. A verdict, however, was taken for the plaintiff, with leave to the defendant to move for a nonsuit. On the hearing of the rule nisi for a nonsuit, Tindale, C. J., said—"It did not appear from the letter, (notice,) by necessary inference, that the note had been dishonored. The rule requires that either expressly or by necessary inference, the notice should disclose that the bill or note had been dishonored; here the no-

tice only states that the note had become due and had been returned unpaid. I think, therefore, that the notice is insufficient, and that this rule must be made absolute." Park, Bosanquet, and Coltman, Justices, expressly concurred on the authority of *Hartly v. Case*, and *Solarte v. Palmer*, 3 Bing. N. C. 683; 32 Eng. Com. Law Rep. 283. In the case of *Phillips v. Gould*, Patteson, J., at the sittings in London, in 1838, ruled that notice from the holder to the endorser of a bill of exchange, stating that a bill of exchange (describing it) lies at my office due and unpaid, was not a good notice of the dishonor of the bill, and referred to the case of *Solarte v. Palmer*, as decided by the House of Lords, 8 Carrington & Payne, 335; 34 Eng. Com. Law Rep. 425.

In the case of *Strange v. Price*, decided in the Common Pleas, in 1839, that court, on the authority of *Hartly v. Case* and *Solarte v. Palmer*, decided that a notice in substance as follows: "Messrs. S. & Co. inform Mr. P. that Mr. B.'s acceptance, £67 5s. 5d., is not paid. As endorser Mr. P. is called upon to pay the money, which will be expected immediately," was insufficient. Denman, C. J., Littledale, Patteson, and Coleridge, Justices, concurring. 10 Ad. & Ellis, 125; 37 Eng. Com. Law Rep. 71.

In the case of *Messenger v. Southey*, decided in the Common Pleas, in 1840, the question of the requisites of a notice to an endorser of a bill of exchange again came before the court for consideration. The notice was in this form: "Sir; This is to inform you that the bill I took you, £15 2s. 6d., is not took up, and 4s. 6d. expenses, and the money I must have immediately. My son will be in London on Friday morning"—was within the previous decisions insufficient. Tindale, J., delivering the opinion of the court. Manning & Granger's Rep. 7639; Eng. Com. Law Rep. 360.

The last English case to which I am able to refer, is that of *Furse v. Sharwood*, decided in the King's Bench, in 1841, in which, after a review of all the previous cases, it was determined in substance that the notice of the dishonor of a bill, by whatever party given, is insufficient if it merely state that the bill has not been paid when due. 2 Ad. & Ellis Rep. N. S. 338; 42 Eng. Com. Law Rep. 726. Thus, after a kind of judicial obstinacy on the part of some of the judges of the common pleas, for about sixteen years, it is finally settled by all the courts, with the express concurrence of the ablest judges of one of the most commercial nations on earth, that when there is no dispute about the facts, the sufficiency of notice to an endorser of a bill or note is a question of law, and that the notice must, by its language, directly or by reasonable implication, inform the endorser that the paper has been dishonored, or the court will declare it insufficient. The same principle was adopted by the Supreme Judicial Court of Massachusetts, in 1842, in the case of *Gilbert v. Dennis*, 3 Met. Rep. 495, and adhered to by the same court in 1845, in the case of *Pinkham v. Macy*, 9 Met. Rep. 174. In this last case, Shaw, C. J., reasserts the rule that the "notice must be such as to inform the endorser, either in terms or by reasonable implication, that the note is dishonored, that

is, that it has been presented for payment and payment refused, or other acts done which is deemed equivalent."

It appears by the digests that the same rule is adopted in several of the other States, but I have not time to refer to the decisions.

In 1845, after these repeated and almost annual adjudications of the English, and some of the highest American courts, for twenty years, the same learned jurist, who delivered the opinion in the case of *Mills v. The Bank of the United States*, in his Commentaries on Promissory Notes, not only states the "indispensable requisites" of the notice to an endorser, as above quoted from sec. 348, but in sec. 350, as to the statement in the notice, that the note has been duly presented and dishonored, says—"This statement is essential to establish the claim or right of the holder, or other party giving notice, for otherwise he will not be entitled to any payment from the endorser. It will be sufficient, indeed, if the notice sent, necessarily, or even fairly, implies by its terms that there has been a due presentment and dishonor at the maturity of the note, but mere notice of the fact that the note has not been paid, affords no proof whatever that it has been presented in due season, or even that it has been presented at all." And in sec. 354, the same learned author, after remarking that the rule adopted in the American courts upon the subject, is far more liberal than that generally maintained in the English courts, says—"If, however, there be no statement of the dishonor of the note, nor any thing from which it can fairly be implied, that due presentment has been made, the notice would seem to be fatally defective." This rule requires only that the endorser should have notice of the dishonor of the note. Whatever will show the dishonor is sufficient, where a note is made payable at a bank, or other particular place, it is the business of the maker to have funds there at the time to take it up, and if he neglect to do so he dishonors his note, and it is sufficient to inform the endorser of that fact. No personal demand of the maker is necessary. But the maker of a negotiable promissory note, payable at large, which may be transferred *ad infinitum*, without his knowledge, does not dishonor his note until upon due presentment and demand he refuses or neglects to pay it. In such case, the holder must make a personal demand, or what is equivalent to a personal demand, of the maker, before he can claim as against the endorser, that the note is dishonored. *Taylor v. Snyder*, 3 Denio, 145; *Gilmore v. Speis*, 1 Barb. S. C. Rep. 158. I confess I am unable to perceive upon what ground this rule can be called illiberal. It prescribes no particular form of notice, which business men must go to a law book to learn, and which must be adhered to even at the expense of substance. It simply requires the holder, in such language as he may choose to adopt, to inform the endorser of the fact that the maker, on being called upon, has neglected to pay the note. That the contingency upon which the endorser's promise to pay the note depended, has happened, and that his liability has become absolute, or in other words, to do what he agreed to do, as the condition of having the endorser's security. This is a condition of the contract important to

the endorser, whose rights are as worthy of protection as those of the holder, and I do not see upon what principle the courts can deprive him of its benefits. It is no answer to say that the holder cannot recover in an action against the endorser, without proving the dishonor of the paper by the party primarily liable. The endorser is not bound by his contract to incur the trouble, expense and business discredit of a lawsuit to find out his liability. He contracted for a cheaper, fairer, and more business-like mode of information, and he has a right to it, and by the rules of fair dealing he has a right to rely on it. And I have no doubt that if an endorser has been induced to pay the paper endorsed by him, by a false notice of its dishonor, he may recover back the money from the party who has thus fraudulently obtained it.

It was suggested on the argument, that the rule contended for is too inflexible and unvarying for practical business purposes; that the activity of commercial pursuits could not safely be cramped by fixed rules on this subject. If it is necessary that this subject should be regulated by law, it is highly proper that that law, however liberal and expanded it may be, should be fixed and invariable. That this subject should be governed by law, is a conclusion not only of reason but of experience. Commercial business dreads nothing so much as uncertainty; it can adapt itself to almost any fixed system, but cannot endure change and mutability in a system by which it is to be governed. Uncertainty destroys business confidence and discourages enterprise. What man would deal in commercial paper, which in some form or other must in all commercial countries be to a great extent the medium of exchange and business, if the liability of the parties to it was from time to time, and again and again, to be left to the verdict of a jury, who, with the purest motives and highest intelligence, have, from their organization, no power to produce uniformity of decision. The necessity of fixed rules on the subject of notice to endorsers was strongly advocated by Lord Mansfield, and the evils of judicial hesitancy to declare such questions to be questions of law and not of fact, noticed by Buller, J., in the case of *Tindall v. Brown*, above referred to. In alluding to the course of English decisions on this subject at that time, the last mentioned honest and learned judge remarked that "The numerous cases on this subject reflect great discredit on the Courts of Westminster. They do infinite mischief in the mercantile world, and this evil can only be remedied by doing what the court wished to do in the case of *Metcalf v. Hale*, by considering the reasonableness of time a question of law and not of fact. This evil, which would be as great now as it was then, has been remedied by the adoption of the rule proposed, and the measure has received the approbation of the business experience and the judicial wisdom of three generations, and I have no doubt that it ought to be sustained, for its conformity to the contract between the parties, for its own intrinsic reasonableness, and for its fitness to promote the safety and prosperity of commercial transactions. After having examined this question more with reference to the importance of the

N. Y. Court of Common Pleas.—*Sisson v. Stevenson.*

principle involved in it, than the amount in controversy between the parties, I have come to the conclusion that the sufficiency of the notice under consideration was a question of law, that the notice was clearly defective, that the Justice and the Recorder's Court erred in sustaining it, and that for this reason the judgment of the Recorder's Court, and that of the Justice, must be reversed.

HORT, *Presiding Judge*, and Justices SILL and MARVIN, concurred.

Court of Common Pleas.

Before the Honorable M. ULSHOEFFER and Judges INGRAHAM and DALY.

LEMUEL SISSON *against* EVAN STEVENSON.

BREACH OF COVENANT—WARRANTY—PLEADING.

Covenant on a bill of sale of a steamboat which was sold free from incumbrances. It appeared that after the sale several bills for wharfage, &c. were presented to plaintiff, and that under a threat of seizure, the plaintiff paid \$114 13. The complainant set out the agreement and facts, and alleged that the bills for wharfage were liens by which the vessel could be seized by attachment or by warrant of distress. Demurrer on the ground that no breaches of covenant had been assigned, and that by the law of this state a distress could only be levied on goods, &c.

Held, that the complainant showed a good cause of action; that any claim for which the vessel might be seized, might be treated as a cause of damage. That the plaintiff using the phraseology "warrant of distress," was immaterial, and might be treated as surplusage. Judgment for plaintiff, with costs.

THIS was an action brought to recover damages for breach of covenant contained in a bill of sale, given by defendant to the plaintiff, of the steamboat James Madison.

The covenant for the breach of which the action was brought, was in these words :

"And I, the said Evan Stevenson, have, and by these presents do promise, covenant, and agree, for myself, and my heirs, executors and administrators, to and with the said Lemuel Sisson, his heirs, executors, administrators and assigns, to warrant and defend the said steamboat James Madison, vessel, and all the other before mentioned appurtenances, against all and every person and persons whomsoever."

The complainant alleged as breach of the covenant, that after the sale three several bills for wharfage, which had accumulated against the vessel before the sale, two of which were for wharfage in New-York and the other at Albany, were presented, and threats of seizure of the vessel and appurtenances were made, under which the plaintiff was compelled to pay the same to avoid a seizure of the vessel and appurtenances, to his damage of \$114 43.

The complainant also set up that it was understood and agreed at the time of the delivery of the bill of sale, the vessel was free and

N. Y. Court of Common Pleas.—*Simson v. Stevenson.*

clear of all incumbrances and liens whatsoever, and then alleged that the said bills for wharfage were liens by which the vessel could be seized by attachment or by warrant of distress.

The defendant demurred thereto. The following were the grounds of demurrer :

1. That the complaint did not set forth any breach of the covenant in the bill of sale to warrant and defend the title of the vessel.

2. That the complaint did not set forth that the vessel had lain at any wharf twenty-four hours, nor that the master and owner of the vessel had refused or neglected to pay the wharfage named in the complaint, or to give satisfactory security for the payment of the same, after having been required by the owner or wharfinger, by notice in writing to pay such wharfage, or to give such security, left on board with the mate or one of the hands belonging to the vessel.

3. That the complaint did not set out any claim or claims against the said vessel and her appurtenances, for which the said vessel could have been seized and detained by warrant of distress.

4. That the complainant did not show how or in what manner the plaintiff was compelled to pay \$114 43, or any part thereof, to save the vessel from seizure.

And in the March special term the case came on before his honor Justice Ingraham for argument as an issue of law.

Jesse C. Smith, for defendant, made the following points in support of the demurrer :

First. The complaint shows that the only covenant in the bill of sale was a warranty of title. But the breaches set out are of an agreement that the vessel was free and clear of incumbrances.

Second. The complaint alleges that there were certain claims and liens upon the vessel at the time of the sale for wharfage, for each of which said vessel was liable to be seized and detained by warrant of distress.

The statute giving power to distrain for wharfage in the city of New-York, gives no right to distrain on the vessel, but upon property on board the vessel, and that for each twenty-four hours, and after demand and written notice to pay such wharfage, or give security for the same, left on board with the mate or one of the hands belonging to the vessel, none of which are alleged to have been complied with. *Rev. Laws, 1813, vol. 2, p. 430, 431, sec. 217.*

Besides this there is no statute giving a right to distrain for wharfage in Albany.

Third. The complaint does not then show how or in what manner the plaintiff was compelled to pay \$114 43, or any part thereof, to relieve the said vessel from seizure.

D. McMahon, Jr., in reply, made the following points for the plaintiff.

First. The covenant to warrant and defend the vessel and the appurtenances against any and all persons whomsoever, is broken,

U. S. District Court.—*Simion v. Stevenson.*

upon proof of a valid existing claim against, or lien upon the vessel for which she could have been taken by warrant of distress or attachment.

Second. The breach is sufficiently set forth in the complaint, because it sets up three distinct claims for wharfage, two claims arising in the port of New-York, and one claim arising in the port of Albany, all within tide waters.

Third. As to the lien for wharfage—1st. In Admiralty—Wharfage may be collected in the admiralty courts without reference to the local laws—and a lien *in rem*, exists against the vessel, the admiralty jurisdiction extending to tide waters. *Gardner on Ship New-Jersey. 1 Peters' Adm'ty Decisions*, p. 223 and 228. 2nd. By the Local Laws,—By charter of Albany, granted by Gov. Dougan, in reign of James II. all the profits, benefits and advantages that should or might accrue or arise at all times thereafter, for anchorage or to wharfage in the harbor, port or wharf of said city, are given to the said city of Albany, and in 5th *Hill*, p. 73, that charter is referred to and an action sustained on it—which is confirmed in 7 *Hill*.

2 *Rev. Laws*, p. 429, provide for a seizure and distress of the appurtenances of the vessel, for wharfage arising in New-York, and point out certain particulars on the part of the wharfinger, which are substantially averred in the complaint.

But as between the wharfinger and the defendant, the plaintiff is not bound to aver with particularity all the steps of the wharfinger, because it is not his business to litigate with the wharfinger claims which are liens, with all the technicality that the defendant's might have done. It is sufficient to aver that the wharfinger served notices on him, and made threat of seizure thereunder, and therefore that he was compelled to pay in order to relieve the vessel from the notified arrest—which facts are certainly breaches of the covenant of warranty.

Fourth. In any event the complaint sets up a cause of action, because it sets up that at the time of delivering the bill of sale by defendants to plaintiff, the defendant represented to, and agreed with the plaintiff that the vessel was free and clear from all claims and liens whatsoever, and sets up further the existence of the claims and liens at the time of the agreement, and consequently the falsity of the defendant's representations, and the payment by plaintiff of all liens and claims in order to avoid the arrest of his vessel, and waives the tort by claiming to recover the amount paid, as so much paid to the defendant's use.

INGRAHAM, J. I think the complaint in this case shows a good cause of action.

It sets out an agreement to warrant the title to the vessel, and that it was free from liens and incumbrances, that the plaintiff was obliged in consequence of threats of seizure for wharfage, alleged to be due, to pay moneys amounting to upwards of \$100 for wharfage which was a lien upon the vessel.

U. S. District Court.—*Simon v. Stevenson.*

The demurrer admits the facts, but the defendant contends that the law of this state only authorized a distress on goods, &c., on board of the vessel. This is so, but still the vessel was also liable, and might have been proceeded against in a different court. Whether the plaintiff is right in saying by warrant of distress or not, is immaterial. Under the present system of pleading those words are to be treated as surplusage. Any claim for which the vessel was liable, and might be seized, may be treated as cause of damage. Under such a covenant the question is not whether the defendant can make out a defence to the claim—but whether the complaint on its face, if the facts stated are proved, makes out a cause of action. I think there can be no doubt of this, and that the plaintiff is entitled to judgment.

Judgment for plaintiff on demurrer with costs.

SELECTIONS FROM RECENT ENGLISH DECISIONS.

House of Lords.

O'BRIEN v. REGINAM, McMANUS v. REGINUM.—10th and 11th May, 1849.

HIGH TREASON—WRIT OF ERROR.

Upon writ of error from the Court of Queen's Bench, Ireland, Held: 1st. That the statement in the caption that the commission had been executed by three commissioners, was not made uncertain by the further statement that the commission included others besides the three judges. 2d. That the plaintiffs in error were not entitled to a copy of the indictment and list of witnesses as of right—the 36 G. 3, c. 7, not extending to Ireland. 3d. That the levying war, &c., in Ireland, was treason under the 25 Edw. 3, c. 2, which was extended to Ireland by Poyning's acts. 4th. That the omission of the words "of death," in the *allocatus* why the court should not pronounce judgment, was immaterial.

Quære, whether, if the plaintiffs in error were entitled to a copy of the indictment and list of witnesses, the objection of non-delivery could be made the subject of a plea.

THE writs of error in these cases were brought to reverse the judgment of the Irish Court of Queen's Bench on a writ of error against the judgment pronounced against the appellants. The objections taken in the writs of error were, 1st. That by the caption of the indictment it did not appear that there was any jurisdiction in the judges before whom the prisoner was tried so to try and convict him. 2d. That a declaratory plea pleaded by the prisoner, claiming a right to the delivery of copies of the indictment and the jury panel and the list of witnesses, ten days before arraignment, was held to be bad on demurrer, and the demurrer to that plea was allowed. (25 Ed. 3, c. 32; 7 W. 3, c. 8; 7 Anne, c. 7; 36 G. 3, c. 7; 57 G. 3, c. 6; 11 and 12 Vict. c. 12.) 3d. That by the effect of Poyning's act, the statute of Edward 3d, regarding treason, was not extended to Ireland; and, 4th. That the *allocatus* in which the prisoner was asked what he had to say "why the court should not give judgment against him," was defective from the omission of the words "of death."

House of Lords.—O'Brien and McManus v. Regina.

Sir Fitzroy Kelly, Napier, and Sir Colman O'Lochlen, for Mr. O'Brien.

O'Callaghan, Seager, and McMahon, for Mr. McManus.

The Attorney General, the Irish Attorney General, Welsby, and Peacock, for the Crown.

The Lord Chancellor having stated that the learned judges were unanimously of opinion that the writs of error could not be supported, the attorney general was stopped, and the following question submitted to the judges—"Whether the plaintiffs in error had maintained the errors assigned?"

The judges having withdrawn, upon their return their opinion was read by

WILDE, Lord Chief Justice :—The first objection was founded on the facts disclosed in the caption, that the commission had been executed by three commissioners nominated for that purpose, acting under a commission directed to them and others. The judges were of opinion that the statement of the appointment was sufficient, and not made uncertain by the further statement that the commission included others besides the three judges. The second question involved two points :—1st. Whether a prisoner indicted for high treason was entitled as of right to a copy of the indictment and a list of the witnesses, ten days before trial; and, 2dly. Whether that objection was properly made the subject of a plea. They were of opinion that the plaintiffs in error were not so entitled, and it was therefore unnecessary to consider whether the objection of non-delivery could be made by a plea. The right was put on the provisions of the 56 G. 3, c. 7, which it was contended the 57 G. 3, c. 6, and 11 and 12 Vict. c. 12, extended to Ireland, but they were unanimously of opinion that the 36 G. 3, c. 7, was in no way operative in Ireland. The next objection that the counts of the indictment charging a levying of war, &c., in Ireland, did not contain any offence known to the law, also failed. The 25 Edw. 3, c. 32, which declared the offence there charged to be treason, was extended to Ireland by Poyning's acts. The next objection, which applied to the allocatus, also failed. The objection as to the challenges had been very properly abandoned in the argument.

The judges having agreed unanimously in their opinion,

The LORD CHANCELLOR moved that the judgment of the court below for the defendant in error should be affirmed.

Lords **LYNDHURST, BROUGHAM and CAMPBELL** having expressed their concurrence with the opinion of the judges, judgment was given for the defendants in error.

House of Lords.—*Lievesey v. Lievesey.***LIEVESEY v. LIEVESEY.—23d April, 1849.****WILL—CONSTRUCTION—ELDEST SON.**

Where a testatrix had excluded from the bequest her daughter's eldest son, or such of her sons as by the death of an elder brother might become the elder son, the death of the eldest son after the testatrix did not affect the bequest, and the second son becoming the eldest before the youngest attained twenty-one, was excluded.

THE testatrix, Jane Worthington, by her will dated April, 1805, devised certain freehold estates, and made several especial bequests, and *inter alia* bequeathed a sum of ten guineas to the eldest son of her daughter, Eliza Lievesey, leaving him no larger sum, because he would have a handsome provision out of his father's and grandfather's estates. She then devised all the residue of her estate and effects, real or personal, to executors on trust, to pay one moiety to the children of her daughter Jane, to be equally divided amongst them when the youngest should attain twenty-one. But if any should die leaving lawful issue, such issue should take the share of the deceased parent, and if her daughter Jane should have no lawful issue, or such children die under 21, the moiety should go to the children of her daughter Eliza. The testatrix then directed the other moiety of her estates and effects to be paid to the children of her daughter Eliza, their heirs, &c., when the youngest should attain twenty-one, except her eldest son, or *such of her sons as might by the death of an elder brother become the eldest son*. The testatrix died in June, 1815, leaving her two daughters surviving, and the will was proved by her daughter Jane, sole surviving executrix. Eliza Lievesey had five children, the eldest of whom was a son, and attained twenty-one in 1817, and died without issue in 1827, whereupon the second son, James Worthington Lievesey, the present appellant, became the eldest son. The third child died under twenty-one, and the fourth and fifth were the respondents, Mary Carter Lievesey, a lunatic, and Harding Lievesey, who attained twenty-one in 1825, and 1830, respectively. The testatrix's other daughter, Jane, had two children. In Easter Term, 1822, a bill was filed to establish the will, and a reference was made to the Master. Several bills of revivor and supplement were made necessary in consequence of the death of some parties, the marriages of others, and the birth of children. On the hearing before the vice-chancellor, in 1842, his honor was of opinion that James Worthington Lievesey had become an eldest son, and was not entitled to take any share in the residuary estate, and that the moiety was divisible between Mary Carter Lievesey and Harding Lievesey, as tenants in common. An appeal from the decree was heard by Lord Chancellor Lyndhurst, in 1844, who, in July, 1846, dismissed it without costs. Whereupon this appeal was presented to reverse the former decree.

Rolt and Speed, for the appellant, contended that the eldest son

Duer on Marine Insurance.

was the eldest son *at the death of the testatrix*, and that the reason for the exclusion of the eldest son had not taken place, as the eldest son, Edmund, had come into most of the property soon after attaining twenty-one, and had given it by will to Mary Carter Lievesey, who ought, therefore, to be excluded from the moiety of the testatrix's estate.

Bethell and *Stinton*, for the respondents.

THE LORD CHANCELLOR said, that the words in the will were perfectly free from doubt, and no artificial rules of construction were required. It was clear that the person who was or should become an eldest son, was excluded from taking a share of the moiety of the residue. The appellant had become an eldest son by the death of his elder brother, before the youngest child attained twenty-one. The court would not introduce phrases to make a will perfect, after events had happened, on the presumption that the testatrix would have spoken differently if she had foreseen those events. The words of the exclusion were sufficient, and the appeal must be dismissed with costs.

[FROM THE LONDON LAW MAGAZINE, OR QUARTERLY REVIEW OF JURISPRUDENCE,
FOR NOVEMBER, 1848.]

DR. DUER'S MARINE INSURANCE.

The Law and Practice of Marine Insurance, deduced from a critical examination of the adjudged cases, the nature and analogies of the subject, and the general usage of commercial nations. By JOHN DUER, LL. D., 2 vol. 8vo. New-York: 1845-46.

We cannot render a greater service to our readers than to call their attention to this remarkable work, of which we propose to give some account. It is the production of a well known and highly distinguished American lawyer, and much as the labors of Chancellor Kent and of Mr. Justice Story, and of some other American jurists, have been appreciated in this country, we are confident that the work of Dr. Duer on the important contract of Marine Insurance, will not suffer by a comparison with the writings of any other jurist. It is, so far as it has gone, the most complete and able work on the subject which has ever appeared in our language; and though published in America, it will be found as useful to the English as it can be to the American lawyer. Indeed, the greater part of the work is founded on the decisions of our own courts; and the illustrations which are derived from the law and practice of America and of Continental Europe, add great additional value to this publication.

This work is also eminently practical, and its plan and execution are so excellent as to render it an indispensable acquisition to every person who desires to understand the principles and practice of Marine Insurance.

The plan of this work is somewhat original, and we think, extremely useful. Instead of giving a mere digest of reported cases, under particular heads, with occasional remarks, which has been too much the character of most of our juridical publications, it first explains and illus-

Duer on Marine Insurance.

trates, in a lecture or commentary, the principles and rules applicable to each head or branch of the contract, and then, in a supplement, which immediately follows, it analyzes and comments upon the various leading decisions and authorities bearing upon these principles and rules. It thus furnishes the student, as well as the practical lawyer, in the most convenient and useful form, not only with the general principles and rules which he must apply to each case as it occurs, but also with those illustrations derived from the leading decisions, or other authorities, by which the rules and principles, previously laid down, may be tested and explained. In the course of these illustrations, Dr. Duer comments with singular ability, upon the several decisions and other authorities to which he refers; and he does not hesitate to point out, though uniformly in a most becoming spirit, any deviation he observes, or to which he deems it right to call the attention of his readers, from the correct principle or rule which he thinks applicable to the case. This is a very valuable part of the work; and it is one which might be usefully followed by our own juridical writers. It requires, doubtlessly, to its proper execution, a perfect comprehension of the subjects under discussion, and a thorough knowledge of the law and practice applicable to the point at issue; but, without such qualifications, no person should aspire to the rank of instructing others in any department of jurisprudence.

The work commences with an ingenious and learned discourse on the question which has been so frequently agitated, as to whether the contract of insurance was known to the ancients, and particularly to the Roman lawyers. This is by far the most full discussion of this question which is any where to be found.

The account which this learned writer next gives of the introduction of the contract of insurance in modern times, is very interesting, and his review of the various authors who have treated of this contract, is exceedingly full and accurate.

After these introductory matters, which are not without their use even to practical lawyers, Dr. Duer proceeds to the main object of his work. His arrangement is very different from what has been usually followed in similar treatises, and leads him to discuss many topics connected with marine insurance, as to which no information is to be found in any of the ordinary treatises on the subject. He begins by treating of the policy and of the parties to the contract, but in treating these matters he discusses all the doctrine relating to *illegal insurances*, and in this part of the work he gives much original and valuable information on the subject of the breach of municipal laws, of the insurance of enemy's property, of trading with the enemy, of neutrality, of contraband of war, of blockade, of domicil, and of the right of search, and of several collateral topics, which, though all essential to a complete view of marine insurance, have never been introduced into any of our ordinary treatises on that subject.

It will thus be seen that this work aspires to the high rank of an international treatise on marine insurance, giving the law applicable to the contract during war, as well as during peace, and thus combining a complete view of this contract. With this object in view, Dr. Duer has made ample use of all the English and foreign authorities which treat on this subject, and he has very skilfully presented to his readers the results of his great and laborious research.

In the first lecture, or commentary, (for the work is divided into lectures, as if addressed to students,) the author discusses all that relates to the form and execution of the policy. And here he explains the rules on this subject, which have been adopted in England and in other European states, and also in America. To show how completely this work may be viewed as

Duer on Marine Insurance.

a practical English authority, we may remark in passing, that the discussions into which the author has entered as to the *English stamp laws*, as applicable to policies of insurance, and as to the alterations which may be made on the policy without affecting the stamp, are as satisfactory as any professional lawyer could desire.

The next lecture relates to the construction of the policy; and contains one of the best chapters which was ever written on the interpretation of contracts.

In the subsequent lecture the learned writer discusses with consummate ability, an important question in the construction of a policy, as to what will constitute such a valid usage as may be permitted to be given in evidence for the purpose of controlling or explaining the terms used in a policy.

After discussing these matters, the author is led, in order to complete his plan, when treating of parties to the contract, to discuss the subject of *illegal insurances*. And on this branch, he treats first of insurances which are illegal, as in breach of municipal laws; and here he introduces a subject which, if glanced at by some previous authors on insurance, has certainly never been so fully or satisfactorily explained and discussed as by Dr. Duer; and the "proofs and illustrations" which he subjoins are of the greatest practical value.

The next subject of illegal insurance relates to the enemy's property; and here the learned author discusses a branch of international law, as to which there has often been much misapprehension, but which he explains and illustrates in a singularly able and satisfactory manner.

The succeeding lecture also relates to the insurance of enemy's property; and it contains a very full and able discussion of the law of *domicile*, so that the character of *enemy* may be clearly ascertained.

The next lecture relates to "trade with the enemy," and explains how far neutrals carrying on such trade can effect valid insurances. This leads to a discussion as to *licenses* and as to *contraband of war*, and other collateral matters, which are all treated with the vigor and talent which characterizes every part of this able work.

The learned author next discusses those questions which relate to the *breach of neutrality*, and in the course of this discussion he treats largely of the subject of *blockade*, and of the consequences to which it leads. We do not know any work in the English language in which this subject is so fully and learnedly discussed.

In the following lecture the discussion relates to the right of neutrals to carry on any trade during war from which they are excluded during peace, and it discusses various topics touching the breach of neutrality. In the course of the discussion, the learned author adverts to the much agitated question as to the right of search of neutral merchant ships, by the cruisers of the belligerent powers; and with a candor which might be anticipated from his vigorous intellect, he frankly admits this right of search as an indispensable concomitant of war, and repudiates the opposite doctrine, which has been so often urged, on the principle that *free bottoms make free goods*. His disquisitions on the resistance to the right of search are extremely valuable, as contributions to international law. And with this valuable lecture, together with the "proofs and illustrations" appended to it, the first volume concludes.

The first lecture in the second volume relates to the parties to the contract and to the assignment of the policy; and the next lecture relates to insurances effected by agents. The work is worth possessing for these lectures alone. In the course of this discussion the law of *lien*, as applicable to agents, is very clearly explained and illustrated.

Obituary.

The next subject of discussion relates to the effect of the concealment of material facts upon policies of insurance, and of the duty to the insurer to make a full disclosure, and the limitations and exceptions to which this rule is subject, are explained and illustrated in a manner that reflects the highest credit upon the sagacity and learning of Dr. Duer.

The last subject treated in the second volume, is the important and somewhat difficult doctrine of representation, as distinguished from warranty. The whole of this intricate and perplexed subject is discussed by the learned writer with a vigor and precision truly admirable.

To each of these subjects the most useful "proofs and illustrations" are appended; and all the discussions, though chiefly referring to English law, are enlivened and illustrated by a reference to the American decisions and authorities, as well as to those of Continental Europe.

We understand that Dr. Duer intends to complete his course of Marine Insurance, by the publication of another volume. And when this volume shall appear, if it shall be executed as skilfully as its two predecessors, we venture to say that we shall then be possessed not only of one of the most valuable contributions to jurisprudence of which our language can boast, but of the most complete and comprehensive treatise on marine insurance which has ever been published.

The two volumes, to which our review has applied, are complete of themselves, and combine such a variety of treatises on so many important subjects connected with marine insurance and with general law, as to be of inestimable value, even though the third volume should never appear. But such is our opinion of the talents of the author, and of the skill with which he applies his learning and research, that we should deplore the want of the concluding volume of this interesting work as a serious loss to the science of jurisprudence.

There are many important general questions which Dr. Duer has discussed with infinite learning and ability, into some of which we, at one time, intended to enter, and to examine, with some minuteness, the views of this learned writer. But however inviting such a discussion might be, we have thought that we should better consult the benefit of our readers by confining their attention to the labors of Dr. Duer, than by any disquisitions of our own. And we, therefore, conclude this brief and imperfect account of one of the most valuable treatises of jurisprudence which this age has produced, by again stating our conviction that we could not render a more important benefit to any person, who desires to understand the doctrine of marine insurance, than by referring them to the learned labors of Dr. Duer.

[NOTE.—We have been compelled, for want of space, to abridge the Review of the learned Doctor's very able work. The Review in the Law Magazine occupies nearly thirteen pages.—ED.]

OBITUARY.

SINCE the publication of our last number, the Bar of New-York has lost two of its greatest ornaments—men alike beloved and admired for their private worth and for their high legal standing—DAVID B. OGDEN, Esq., and JOHN L. LAWRENCE, Esq.

Meetings of the Bar have been held, and resolutions of respect to their memories have been passed. In our next number we shall endeavor to give in detail the resolutions passed, and a brief account of what took place at the meetings.

THE
New-York Legal Observer.

VOL. VII.] NEW-YORK, SEPTEMBER, 1849. [MONTHLY PART.

IMMATERIAL VARIANCES.

In all the various business transactions and relations of life, the *amount* or extent of one person's indebtedness to another is considered *material*. And where no contract exists, the same train of thinking and reasoning has been adopted. Thus, persons who are about retiring from business, are accustomed to consider the *amount* of the fortune which they have acquired as *material* in influencing their determination. And so strongly has this idea taken possession of the human mind, that it influences the dying bequests of the aged, enlivens the hopes of youth, and strengthens and sustains the exertions and labors of the middle-aged. And that individual who can throw himself across this strong current of hopes and efforts, and teach mankind that the *amount* of their earthly possessions is *immaterial*, must possess a vigor of intellect far exceeding that of any one who has yet appeared on the stage of action to influence and control the human mind.

It has been said, falsely, perhaps maliciously, certainly with cruel and bitter sarcasm, that the court of appeals of this state has commenced this great work, and actually entered upon the accomplishment of it. That in deciding a case in relation to the sufficiency of a notice of protest to charge the endorsers of a promissory note, that court has intimated that a variance between the *amount* of the note as stated in the notice of protest, and "the note intended to be referred to," was *immaterial*.

The question arose on the sufficiency of a notice of protest to charge the defendants as endorsers of a promissory note in the words and figures following, to wit:

"\$600.

"Ninety days after date, I promise to pay to the order of F. L. Griswold and E. A. Warden, six hundred dollars, for value received, at the Cayuga County Bank.

"Auburn, N. Y., January 30, 1845.

(Signed)

"S. WARDEN."

Endorsed "F. L. GRISWOLD,
"E. A. WARDEN."

Immaterial Variances.

The notices of protest were directed to each endorser individually, by which *he* was "requested to *take notice*, that S. Warden's note for *three hundred dollars*," endorsed by *him*, was protested for non-payment.

On the second trial of the cause, at the Cayuga circuit, in January, eighteen hundred and forty-eight, the defendant's counsel requested the justice before whom the same was tried, to decide among other things, as a question of law, that the plaintiffs had not proved enough to entitle them to recover, or to charge the defendants as endorsers of the note in question.

"*First*. Because the notice of protest served on the endorsers, was not a notice of protest of the note in question, but was a notice of protest of a *three hundred dollar note*, instead of a *six hundred dollar note*.

"*Second*. Because the note is made payable to the order of the defendants *jointly*, and is endorsed by them *jointly*, and the notice of protest served speaks only of an individual endorsement."

The justice sustained the objections and rendered judgment for the defendants, which the supreme court refused to set aside; and the plaintiffs removed the cause by writ of error into the court of appeals. On deciding the case, the judge, who delivered the opinion of that court, says, "It is contended that the notice of protest, merely informs the defendants of the non-payment of a note drawn, and endorsed respectively by the defendants, for \$300, and not of a note for \$600, endorsed by the defendants *jointly*. Concede that such variance or mistake exists. It is well settled in accordance with good sense, that an immaterial variance in the notice will not vitiate it." The point decided was one not in the cause, and neither raised or presented to the court, or disputed by either party, viz: that "an *immaterial* variance" would "not vitiate" a *good notice*. And although a casual reader of the opinion might infer that the court intended to decide that a variance between the *amount* of the note produced, and the *amount* of the note, which each defendant was requested to take notice had been individually endorsed by him, and protested for non-payment, was *immaterial*, it will be found on a very slight examination of the question, that the very reverse of that was decided, and that the whole argument of the judge proceeds on the supposition that the variance was material; else why so much effort to show that the notice served, when taken in connection with certain accessory facts, conveyed to the minds of the defendants when received by them, information that the identical note in question had been dishonored. If the notice described the note correctly, it was perfectly immaterial whether it did or did not convey to the minds of the defendants, or either of them, when received, information that the identical note in question had been dishonored. Why, also, the statement that "it was said on the argument, that the notice, to be effectual, must be *perfect on its face*, to carry the information to the endorser of the non-payment of the note, and that it could not be aided by accessory facts," and the reference to the cases of *Shelton v. Braithwaite*, 7 Mees. & Welsby, 436, and *Stockham v. Parr*, 11 Id., 809, as

Immaterial Variances.

"very much in point to show that a notice *defective on its face* might be aided by accessory facts." The truth is, the court held, "in accordance with good sense," and well settled principles, that the notice was "defective on its face," and insufficient in and of itself to charge the defendants as endorsers of the note in question, and that the variance between the *amount* of the note produced, and the amount of the note stated in the notice as having been protested for non-payment, was material, and the question turned on the supposed information which such a notice, when received, conveyed to the mind of the defendants when taken in connection with the peculiar accessory facts of that particular case.

Whether the variance was material or not, could perhaps have been very satisfactorily ascertained by the defendants proposing to the bank to take a judgment against *one* of them for *three hundred dollars*, according to the description of the note in the notice of protest, instead of taking a judgment against *both of them jointly* for *six hundred dollars*. If there is no material variance between a *six hundred dollar note*, endorsed by *both* defendants *jointly*, and a *three hundred dollar note*, endorsed by *one of them* individually, *apply the rule to the plaintiffs*, and let *them* take their judgment accordingly.

The question might be further illustrated by supposing the defendants had executed and delivered to the bank a bond conditioned that the defendants would, on the 3d day of May, 1845, procure and deliver to the plaintiffs S. Warden's note for *six hundred dollars*, endorsed by them *jointly*, and on that day they had offered and tendered to the plaintiffs such a note as is mentioned in the notice of protest, and the bank had refused to receive it and discharge the bond, would proof of the tender of such a note support a plea of performance of the condition of the bond? This is only reversing the question. The contract which Warden and Griswold made with the bank, and the case supposed, are both conditional contracts, and if the tender of such a note as is mentioned in the notice of protest would not discharge the bond, how could the service of a notice, of protest describing such a note, charge the defendants as endorsers of precisely such a note as is mentioned and described in the supposed bond?

Quitting the field of argument, and passing by the consideration of the *causes* which produce contention and strife, and turning to adjudged cases, it will be seen that they are all uniformly one way, and that no case can be found where the *amount* of the contract has ever been holden to be *immaterial*. To the thinking and reflecting—to those who are daily accustomed to hear the question asked, what is the price of this, and how much is that worth—who know with what anxiety not only parties but friends wait after a cause has been submitted to a jury, whether the question involved be one of property or character, to learn the *amount of the verdict*—and who hear the extent and degree of punishment to be inflicted on the thief graduated and limited in the sentence pronounced by the court as the *amount* stolen exceeds or falls short of the sum of twenty-five

Immaterial Variances.

dollars, will look at such a reference as useless, and perhaps as a work of egotism, rather than as a necessary effort to maintain and enforce a well settled principle of commercial jurisprudence. But two cases will, therefore, be given for the purpose of supporting "a principle which is of itself paramount to all authority." Those who have a disposition to investigate the subject further, or whose curiosity may lead them to examine the number and variety of cases decided on the subject, will very readily find a reference to them in almost every digest.

In *Bibbins v. Noxon*, 4 Wend. 207, a variance of *six cents* was held to be material, and judgment rendered for the defendant. In the case of *Bissel v. Drake*, 19 Johns. R. 66, the action was trover for a promissory note. The declaration described the note as follows:—"One promissory note in writing, made and drawn by one Francis Carlisle, whereby the said F. C. promised to pay to the plaintiff, John D. Bissel, or his order, a certain sum of money, to wit, the sum of *one hundred and eighty dollars*, at a certain time therein mentioned, now past." Five other notes were described in the same manner, each for 180 dollars, three of which were stated to be payable on demand.

At the trial, a witness for the plaintiff testified, among other things, that the note on its face was for *three hundred dollars* or more, and the *balance due* was 170 or 180 dollars, including interest to the time when it came to the possession of the defendant. On the plaintiff's resting, the defendant's counsel moved for a non-suit on two grounds: 1. Because of the variance between the note described in the declaration and the one proved. The motion was denied, and the jury found a verdict for the plaintiff for 239 dollars and 60 cents, subject to the opinion of the court.

On a motion for judgment on the verdict, the court said, "the variance between the note declared on, and the one proved to have been converted, is fatal. The declaration states the note to be for 180 dollars, and it appeared in evidence to be a note for 300 dollars. The *amount* of the note was *material*; and its being laid under a videlicet will not, in such case, dispense with strict proof of the allegation. 1 Chitty's Pl. 308; 6 Term R. 46; Bull. N. P. 37; 2 Esp. N. P. 200; 3 Selwyn's N. P. 1165. The authorities show, that the variance between the note alleged, and the note proved, was material and fatal. Where the party is incapable of stating the date and amount of a note of which he is dispossessed, the law will not require him to make such statement; it will be satisfied by an allegation that the note is of great value, to wit, of the value of a certain sum. *But here the plaintiff has undertaken to state the precise amount for which the note was given, and his proof does not correspond with the statement. New trial granted.*"

LEGES.

TRADE MARKS.

USING THE TRADE MARKS OR NAME OF ANOTHER—INJUNCTION.

WE have given most, if not all, the important cases on this interesting subject in our work; the last case of this kind will be found reported in vol. 6, p. 245, of the N. Y. Legal Observer. We find the following remarks with reference to that case in the London Law Magazine, for November, 1848, which we think of sufficient interest to lay before our readers:

"There is a numerous class of cases in which persons have been restrained by injunction from using the name, trade mark, or indicia of another, where they have attempted a fraudulent imitation of that under which the plaintiff had obtained a character and reputation. The principle on which courts of equity proceed in granting relief and protection in cases of this sort is well understood. A man is not to sell his goods under the pretence that they are the goods of another man; he cannot be permitted to practice such a deception, nor to use the means which contribute to that end. "I own," says the Master of the Rolls, in *Perry v. Truefil*, 6 Beav. 66, "it does not seem to me that a man can acquire a property in a name or mark; but whether he has or not a property in the name or mark, I have no doubt that another has not a right to use that name or mark for the purpose of deception, and in order to attract to himself that course of trade, or that custom, which, without that improper act, would have flowed to the person who first used, or who was alone in the habit of using the particular name or mark." See also *Knott v. Morgan*, 2 Keen, 213; and *Croft v. Day*, 7 Beav. 84.* Again, in the case of *Millington v. Fox*, 3 M. & Cr. 338, the principle was carried to a still greater extent; from that case it would appear, that the deception need not be intentional, and that a man, though not intending any injury to another, shall not be allowed to adopt the marks by which the goods of another are designated, if the effect of adopting them would be to prejudice the trade of such other person.

"In the principal case, there was a circumstance which distinguished it from those we have alluded to, and from any others to be found in the works of the same class, viz., the person whose name had been used did not himself sell things of a similar kind in his own name. The facts of the case are extremely simple. The plaintiff, a celebrated physician, especially in cases of consumption, prayed an injunction to restrain the defendant, a chemist and druggist, from using his name in advertising certain pills, which he called "Sir J. Clarke's Consumption Pills." Now, it is clear from the authorities already cited, had the plaintiff been an apothecary, the court would

* See also the very able and learned opinion of Chancellor Walworth, 5 N. Y. Leg. Obs. 94, also the opinion of Vice-Chancellor Sandford, 3 N. Y. Leg. Obs. p. 404.

N. Y. Superior Court.—Ford v. G. & G. W. Babcock.

have interposed its aid, inasmuch as the defendant's conduct would have amounted to an interference with the plaintiff's profits in business. But here the Master of the Rolls refused the application, on the ground that the present case appeared to be one of defamation, and to grant the injunction would be tantamount to restraining the publication of a libel; and because, in his judgment, it differed essentially from the cases cited by the plaintiff, including *Lord Byron v. Johnson*, 2 Mer. 29, (where the defendant falsely represented the work which he had published to be the work of Lord Byron,) in this particular, that here the plaintiff was not in the habit of manufacturing pills.

"In all previous cases it will probably, as already mentioned, be found that the plaintiff was himself a manufacturer of the article imitated, and so likely to suffer *directly* in his trade from the imposition on the public. It would now, therefore, seem that the observations of his honor on the principal case, that this circumstance is a requisite element to induce a court of equity to interfere, and that an action at law affords the only redress for an injury which may *indirectly* result to a man's professional reputation from the improper issuing of articles (in which he himself does not deal) under his name by another."

N. Y. Superior Court.

[General Term, May, 1849.]

Before Justices DUER, MASON and CAMPBELL.

GEORGE W. FORD V. GILES BABCOCK AND GEORGE W. BABCOCK.

A plea is not rendered double by an express averment of facts which, without such an averment, would be implied.

An averment to render a plea double, must set up a separate defence.

To prevent the statute of limitations from commencing to run, it is not necessary to aver that the defendant *resided* out of the state when the cause of action accrued. It is sufficient that the defendant, at that time, was out of the state. The statute applies both to residents and non-residents.

Nor in order to set the statute in motion by the return of an absent defendant, is it necessary to show or aver that he resided within the state after his return. The fact of a return is sufficient.

In pleading the statute, the defendant is not bound to negative the exceptions created by the second clause, section 27. It lies upon the plaintiff to aver and prove the facts that create an exception from the general rule that the statute establishes.

In a plea that six years had elapsed since the return of the defendant, it is not necessary to aver that his return was public and notorious, so that the plaintiff, with due diligence, might have caused him to be arrested, for these facts are implied in the allegation of a return, and in order to sustain the plea, must be proved upon the trial.

The safest and best mode of pleading a defence founded upon a statute, is to follow the words of the law, since the same construction must be given to the words in the plea as in the statute.

Cole v. Jessup, (2 Barbour's Sup. Court Reports, p. 309,) is inconsistent with all the other cases, and its authority therefore denied.

N. Y. Superior Court.—Ford v. G. & G. W. Babcock.

The Superior Court, as now constituted, is not bound by the decisions of the present Supreme Court. It is now a *co-ordinate*, not a *subordinate* tribunal.

The new exception created by the second clause, sec. 27, of the statute of limitation is not confined to residents in the state. It embraces non-residents as well as residents; nor is it only the first period of the absence of a defendant that is to be deducted from the term of limitation that the statute allows. Successive absences must be accumulated and deducted.

The intention of the legislature was to abolish the former rule, that "where the term of limitation had begun to run, it continues to run without suspense or intermission until its expiration," in all cases to which it applies.

Hence, to create a bar under the present statute, it must appear that the defendant was six years within the state, deducting each period of absence, after the cause of action accrued.

The decisions on this branch of the statute are various and contradictory.

THIS was an action on a bill of exchange, by the endorsee against the drawers.

The declaration contained a count on the bill, and the usual money counts.

The defendant Babcock interposed among other pleas, the following:—

That the cause of action accrued 11th May, 1837, and more than six years before the commencement of this suit, and did not accrue within six years next before the commencement of this suit. That when it accrued, the defendant resided in Louisiana, and was out of the State of New-York, and that after it accrued, more than six years before the commencement of this suit, viz. 1st August, 1838, the said defendant returned into the State of New-York.

Demurrer to this plea, assigning the following causes:—

I. Duplicity in this, 1st, That the cause of action did not accrue in six years. 2d. That when it accrued, he resided in Louisiana, and it was not commenced within six years after his return.

II. That the plea does not aver that the defendant *resided* out of the State of New-York, but only that he was out of it at that time.

III. That it does not show that he acquired a residence in New-York, or ceased to be a resident of Louisiana, or how long he was in New-York.

IV. That it does not negative the statute, except as to the continuance of the statute to run after it had commenced running against one who was a non-resident when the cause of action accrued, namely, a new departure from and residence out of the state.

V. That it does not show that his return was public, or that the plaintiff had notice of it, or that they could have served process on him. The second plea was the usual plea of *actio non accrevit*, &c.

The second reply to this plea was as follows:—

That when the cause of action accrued, the defendant resided out of the State of New-York, viz. in Louisiana. Defendant neither "was or remained or continued within the State of New-York for the space of six years in the aggregate at any time or times between the accruing of this action and the commencement of this suit. As often as the defendant returned into New-York after the accruing of this action and before the commencement of this suit, the defendant so returning, departed from and resided out of this state: except that Giles returned within six years, and did not again depart. The

N. Y. Superior Court.—Ford v. G. & G. W. Babcock.

aggregate of all the time which defendant has resided in New-York since this action accrued, is less than six years."

Demurrer to this replication assigning the following causes:—

I. That it is not responsive to the plea.

II. That it is argumentative and evasive, viz. it says defendant resided out of the State of New-York when the cause of action accrued, and does not aver a return with certainty, so that issue could be taken thereon; but leaves the fact of such return to *inference*, instead of alleging such return.

III. That it admits that defendant resided out of New-York when the cause of action accrued, and returned here more than six years before suit.

IV. That it does not aver that the return was clandestine or unknown to plaintiff, or that plaintiff could not have served process on defendant within six years after such return.

V. That the statute (2 R. S. 297, sec. 27) has two clauses, and provides for the application of a different rule to each case. The reply shows this to be a case under the first clause, and attempts to apply both rules to it.

To this second plea of *actio non accrevit*, &c. the plaintiff also made a fourth reply, viz.

That the defendant did not reside in the State of New-York for the space or period of six years in the aggregate at any time or times, between the time of the accruing of this cause of action and the commencement of this suit.

Demurrer to this replication assigning the following causes:—

I. That it is not responsive to the plea.

II. That it is evasive, viz. that it does not aver that defendant was out of the state when the cause of action accrued, or that he resided in New-York when cause of action accrued, and subsequently departed.

III. That it admits that defendant resided abroad when the cause of action accrued, and does not aver that the suit was commenced within six years after his return.

IV. That it does not aver that the defendant was in the State of New-York when the cause of action accrued and afterwards departed, but seeks to have such departure inferred, without specifically asserting it in such form that issue could be taken thereon.

V. That it does not aver that such returns were clandestine or unknown to plaintiff; so that plaintiff could not have served process more than six years before the commencement of this suit.

VI. That the statute provides for two cases, (1st,) when the defendant is out of the state when the cause of action accrues; (2d,) when he resides here when the cause of action accrues and *subsequently* departs. This replication does not specify under which clause of the statute the case comes, and attempts to make the computation as if it came under both clauses.

Joinder to each of the demurrers.

Homer H. Stuart, for defendant.

The question raised is on a demurrer to the third plea by the plaintiff, and demurrer by defendant to the second and fourth replications.

As to plaintiff's demurrer to third plea, plaintiff specifies as his first cause of demurrer that the plea is double.

It is not double. The allegation in plea that the cause of action did not accrue in six years, &c. is sustained by the subsequent statement that defendant was out of the state at the time the cause of action accrued, and returned more than six years. (*Didier v. Davidson*, 2 Barbour Chan. Rep. 477). The latter part is a more explicit and detailed averment of the way and manner in which the defendant intends to apply the statute barring actions which accrued more than six years, &c. It might have been unnecessary to set it out so fully, but the most that can be said against it is, that it is surplusage. To make a plea double, it must contain *two separate defences*. This is a *single* defence; to wit, that the cause of action accrued more than six years before suit commenced, and a statement of facts showing the precise manner in which it accrued.

The *second* cause of demurrer is not well taken—for it is not true. The plea says defendant *resided* in Louisiana, and was out of New-York, which is equivalent to saying he *resided* out of New-York.

The third cause of demurrer is not sound. The fourth cause of demurrer is not sound.

If the cause of action accrued when the defendant was out of the state, a return to New-York set the statute running, although such return was not followed by a *residence* in New-York. (*Randall v. Wilkins*, 4 Denio's Rep. 577). The suspension of the statute applies only to a case where the defendant was in the state at the time the cause of action accrued, and *subsequently* departs and resides out of the state. (*Cole v. Jesup*, 2 Barb. Sup. Court Rep. 309). Under the first clause of the statute *residence* is not made the question, but the mere fact of being out of the state, is all that is required to bring a case within that clause. But under the last clause, a departure alone is not sufficient, *residence* must change. The plea places this case under the first clause, and therefore an averment of *residence* was unnecessary. (*Ruggles v. Keeler*, 3 Johns. Rep. 267).

The fifth cause of demurrer is bad.

The plea uses the very words of the statute, which it pleads as its defence.

If such return was clandestine or fraudulent, such matter would constitute a *replication* to the plea, which is an admission and avoidance of the plea; but the plea on its face would be good, and could be attacked by the new matter shown in the replication, and unless that new matter was set forth in the reply would be sufficient.

As to defendant's demurrer to second reply to second plea.

This reply admits, that defendant resided out of New-York when the cause of action accrued; admits a subsequent return—but does not aver that such return was within six years next before the com-

commencement of this suit, and does not deny that the cause of action accrued more than six years, &c.

It is *evasive* and *argumentative*. The essence of this reply is intended to consist in the allegation of a return to New-York, and yet this averment is made without fixing any time for such return, or asserting in direct manner, that the defendant *did* return and tendering a definite issue on that point, but leaving the fact of such return to follow as an *inference* from other assertions. The language is—"whenever and as often as" the defendant returned to New-York, he, "so returning again departed," &c. This assertion *may* be true, and yet the defendant may have never returned to New-York at all.

The reply admits that defendant resided out of New York when the cause of action accrued and subsequently returned, and seeks to avail itself of *several* separate departures. It adopts the principle that the aggregate residences in New-York must be six years. *Cole v. Jesup*, 2 Barb. Sup. Court Rep. 309). The courts have rejected this principle. No departure from the state can be deducted, except in a case arising under the *last* clause; namely, when defendant was in the state when cause of action accrued, and *subsequently* departed. The plea and reply show this case under the *first* clause, and only the departure can be deducted under *either* clause of the statute.

This reply does not allege that any of these returns to New-York were clandestine or fraudulent, or unknown to the plaintiff, or the plaintiff could not serve process at the time of such returns. If the want of such averment is good ground to sustain the plaintiff's demurrer to third plea, it sustains defendant's demurrer to this reply. The two pleadings are alike in this respect.

As to the defendant's demurrer to fourth reply to second plea. All the objections above stated to second reply, apply with even more force to fourth reply.

It admits that the cause of action accrued more than six years, &c. It does not aver any departure from New-York, except by *inference*. It does not aver that the action accrued when the defendant was out of the state. It does not aver that the return was within six years; nor does it aver that any of these returns were clandestine or unknown to the plaintiff.

The whole gist of this reply is, that the *aggregate* of the times in which defendant resided in New-York was less than six years. It assumes the principle that the aggregate absences must be sufficient to leave the aggregate residences more than six years, in order to make the statute available to a defendant. This is not the true construction of that statute. The section (sec. 27) contains two distinct clauses. The *first* clause is the case when a debtor is *out* at the time the debt becomes due, and *subsequently* returns. This is the original English statute, and was our statute till the revisions in 1830 added the subsequent clause. Under this statute, as it stood before the second clause was added, it was settled that *one* return set the statute in motion, although such return was temporary and not followed by a continued residence thereafter in this state (*Fowler v. Hunt*, 10

N. Y. Superior Court.—Ford v. G. & G. W. Babcock.

Johns. Rep. 464). That after the statute had once commenced running, it continued to run, and no subsequent disability attached.

The *second* clause (added by our revisors) is the case where a debtor resides in New-York when the debt becomes due, and *subsequently* departs from and resides out of the state.

Our case is under the *first* clause, and therefore the exception contained in the second clause cannot help the plaintiff.

Again; the second clause provides for only *one* departure, and the reply seeks to take advantage of *several* departures.

Again; the reply attempts to apply to this case which is under the first clause of the statute: the rules render *both* clauses.

F. Laroque, for plaintiff, contra.

I. The defendant's third plea is bad.

1. The plea, admitting that the defendant's residence was in Louisiana when the cause of action accrued, his place of residence is presumed to have remained the same until the contrary is made to appear; and it is not enough to say, that he returned into the State of New-York, without the plea showing that he then became a resident of this state, or that he remained within this state six years, so as to bar the action. 2 R. S. 225, sec. 27, 2d edit.

2. The time of residence abroad of the defendant after the cause of action accrues, is an exception to the running of the statute carved by the act out of the time elapsed from the accruing of the cause of action, and where the plea shows that the defendant resided abroad when the cause of action accrued, the fact of the case coming within this exception must be negatived.

3. The plea is bad, because it does not show that the defendant's return was public, or that the plaintiff had notice thereof, or could with due means or ordinary diligence have had process served upon him. *Fowler v. Hunt*, 10 Johns. Rep. 464; *Ruggles v. Keeler*, 3 Johns. R. 264.

4. The plea is double, setting up two distinct defences, (a) that the causes of action did not accrue within six years next before the commencement of the last; and (b) that when they accrued, he resided in Louisiana, and the suit was not commenced within six years after his return. *Tuttle v. Smith*, 10 Wend. 386.

The plea is entirely improper, because he should simply have pleaded the statute in the ordinary form, leaving the plaintiff to reply that when the causes of action accrued, he resided out of the state, and that the suit was commenced within six years after his return, or that after they accrued he departed from and resided out of the state, upon which he should have taken issue in his rejoinder. *Huntington v. Brinckerhoff*, 10 Wend. 283. If he could set up in his plea the facts which would properly come out in the replication and rejoinder, to avoid duplicity, he should have pleaded in this form. That when the causes of action accrued, he resided in Louisiana: that after they accrued, he returned into this state, and that *such return was more than six years before the commencement of the suit*, leaving out

N. Y. Superior Court.—Ford v. G. & G. W. Babcock.

entirely the averment that the suit was not commenced within six years *after the causes of action accrued*.

II. The second replication to the second plea is good.

It is intended to meet this aspect of the case; namely, that the defendant resided abroad when the cause of action accrued; that he returned into the state one or more times after the cause of action accrued, and before the commencement of the suit, and that every time that he returned into the state, he again departed from it and resided abroad, except on the last occasion, when the suit was commenced.

In order to do this successfully, it was necessary to show—

1. That he was not within the state six years in the aggregate after the cause of action accrued, either as a resident or a non-resident.

2. That he had not his domicile or usual place of residence within the state six years in the aggregate after the cause of action accrued, although while he had his *domicile* or *place* of residence here, he might have been absent. 2 R. S. 225, sec. 27, 2d edit.

The replication contains all that is necessary to show these facts, and no more.

III. The fourth replication to the second plea is good. It contains all the same requisites, and meets the same state of facts in a shorter form with this difference: it admits the averments of the other replication, and absolves the plaintiff from proving that the defendant did, from time to time, return into the state and again depart from and reside out of it.

DUER, J., delivered the opinion of the court. This is an action upon a bill of exchange by the plaintiff as an endorsee, against the defendants as drawers. In addition to a count on the bill, the declaration contains the usual money counts. One of the defendants, Giles Babcock, has interposed several pleas; and to his third plea, the plaintiff has demurred. On the part of the plaintiff, there are several replications to the second plea of the same defendant, and to the second and fourth of those replications, the defendant has demurred. It is upon the issues of law joined upon these demurrers that the cause has been heard; and as no exceptions have been taken to the declaration, our attention will be confined to those that have been taken to the pleadings that are alleged to be vitious.

The third plea, omitting the introductory part, avers in substance that the several causes of action accrued to the said plaintiff more than six years before the commencement of this suit, and that when they accrued, the defendant was a resident of the state of Louisiana, and was out of this state, and that after they so accrued, and more than six years next before the commencement of this suit, he returned into the state of New-York. The plea is founded on the first clause of sec. 27 in that article of the Revised Statutes which relates to the time of commencing personal actions, (2 R. S. p. 297). That clause provides in substance, that "if at the time when any cause of action

shall accrue against any person, he shall be out of this state, such action may be commenced within the terms before limited after the return of such person into the state." This provision is substantially a re-enactment of the law as it formerly existed; it was originally borrowed from the English statute of Queen Anne (4 and 5 Anne, c. 15, sec. 19), and the exception which it creates, however doubtful the interpretation may seem,—it appears to be settled, applies as well to non-residents, as to persons who, although residents, were out of the state when the cause of action accrued. Such at least has been the law in this state since the judgment of the Supreme Court in *Ruggles v. Keeler*, 3 Johns. 263, although the English cases there cited, seem hardly to support that decision. The same construction has been given to the statute in Massachusetts. (*Dwight v. Clark*, 7 Mass. 515; *Little v. Blunt*, 16 Pick. 359.) The demurrer to this plea is special and assigns five several causes of exception. The first cause is, that the plea is double, setting up two distinct and separate defences. 1st, that the causes of action did not accrue within six years next before the commencement of the suit; and 2d, that when they accrued, the defendant resided in Louisiana, and that the suit was not commenced within six years after his return." We are satisfied that the demurrer cannot be sustained upon this ground. A plea is not rendered double by an express averment of facts that without such an averment, must have been implied; the unnecessary averment may be rejected as surplusage, but cannot vitiate a plea otherwise valid. It was admitted by the counsel for the plaintiff who argued the case with singular candor, as well as ability, that the objection of duplicity could not have been raised had the plea been limited to the averments that the defendant was out of the state when the causes of action accrued; that he afterwards returned, and that more than six years had elapsed since his return, before the commencement of the suit: yet it is evident that these averments involve, by a necessary implication, the assertion that more than six years, had elapsed since the causes of action accrued. An express averment of the same fact, has not the effect of introducing a new and distinct issue. It alters the form of the plea, but leaves the substance and meaning unchanged. The fact that more than six years had elapsed since the causes of action accrued, and more than the same period since the return of the defendant, were both necessary to be stated to complete the bar that the plea was intended to raise. Had the plea been framed, as it was insisted it should have been, the plaintiff might have replied, by taking issue upon either of these facts, and it is therefore certain that no separate defence is set up by the express averment.

In support of the objection we are now considering, we are referred to the case of *Tuttle v. Smith*, 10 Wend. 288, but, in reality, the decision in that case, far from sustaining the objection, justifies us in overruling it. The plaintiff replied to an ordinary plea of the statute of limitations, that the defendant had made a new promise, and that the suit was commenced within six years after the promise was made;

N. Y. Superior Court.—Ford v. G. & G. W. Babcock.

the defendant rejoined taking issue upon both facts, the new promise and the commencement of the suit within the period allowed by the statute. This rejoinder was the pleading demurred to, and the court held it to be double, upon the ground that the denial of either of the facts upon which issue was taken, would have been a complete answer to the replication:—but the replication was admitted to be valid, because those facts were necessary to be combined in one statement in order to avoid the operation of the statute. There is a perfect analogy between the replication in that case and the plea in the present.

The second cause of demurrer is, that the plea does not aver that when the causes of action accrued, the defendant resided out of this state, but only that he was out of the state at that time. This is a mistake; the plea does contain the averment in question, and had it been omitted, the omission would not have vitiated the plea. The statute is satisfied by an averment that the defendant was out of the state when the cause of action accrued. An opposite construction would confine its application to non-residents, whereas the only doubt has been whether it applied to them at all.

The next cause of demurrer is, that the plea does not show that the defendant ever acquired a residence in this state, or ever ceased to be a resident of Louisiana, nor for how long a space of time he was within this state, and the reply is, that these averments were not merely unnecessary, but that their introduction would probably have vitiated the plea. They give a construction to the statute not justified by its language, and inconsistent with all the decisions. They imply that a debtor permanently residing in New-Jersey or Connecticut, may in the transaction of his business, visit this city on every day of his life, and yet during his life, the statute never commence to run.

The fourth cause of demurrer is, that the plea does not negative the exception created by the second clause in the 27th section of the statute, the terms of which in the progress of our opinion will be fully stated. This objection must also be overruled. Where the statute of limitations is pleaded, it lies upon the plaintiff to aver, not upon the defendant to deny, the existence of facts that create an exception from the general rule that the statute establishes. It has, however, been decided by this court, that the particular exception to which this cause of demurrer refers, is never necessary to be stated in the pleadings, but that when issue has been taken upon a general plea of the statute, the facts that create the exception may be given in evidence upon the trial in contradiction of the plea.

This decision was rested upon the peculiar words of the statute, and is fully justified by prior decisions of the supreme court in analogous cases. (*Graham's Executors v. Schmidt & Webb*, 1 Sand. Sup. C. R. p. 74).

The last clause of demurrer is that which was chiefly relied on, and merits the most consideration. It is that the defendant has not averred in his third plea that his return to this state was public, or that the plaintiff had due notice thereof, or could with due means and ordinary diligence have had process of law served upon him. The

construction of the statute that is here assumed to be correct, is established by numerous decisions. It is fully settled, that where the debtor was out of the state when the cause of action accrued, his return, in order to set the statute in motion, must be such in its nature and duration, as to afford to the creditor the opportunity of commencing a suit and prosecuting his claims. It must appear when the return is pleaded, that it was either actually known, or was so public that with ordinary diligence, it might have been known to the plaintiff when it occurred; but although in order to give efficacy to the return, these circumstances must be proved on the trial, it by no means follows that they are necessary to be averred in the plea; on the contrary, the very cases that are justly relied on as showing the true interpretation of the statute, equally show that no such necessity exists. When a statute is pleaded, whether as conferring a right or sanctioning a defence, we have always understood that the safest, if not the necessary course, is to adopt and follow in the pleading, the very words of the law, and if we except the single case to which we shall hereafter refer, we are not aware that the efficacy of a plea which sets up a defence in the very words in which the defence is given by a statute, has ever been doubted. In very many cases, the interpretation that courts of justice have given to a statute, differs widely from the literal import of its language; but it has never been thought necessary or prudent to depart from the language of the statute in order to conform a pleading to its known judicial interpretation; and the reason is evident. When the words are identical, it is the plain duty of judges to give to them in the pleading, the same construction as in the statute. The plea in this case is in exact conformity to the statute; it says all that the statute requires to be said, and the word "return" in the plea has the same meaning as in the law. It means such a return as the courts have decided to be necessary, in order to set the statute in motion, and it is such a return that in order to sustain the plea, the defendant will be obliged to prove. It is not, however, to be denied that the objection we are now considering, is fully sustained by a recent decision of the supreme court in the fourth judicial district, in the case of *Cole v. Jessup*, 2 Barbour, S. C. R. 309. In this case a rebutter, that the suit was not commenced within six years next after the return of the defendant, was held to be bad, from the want of an averment that the return was such as the law in similar cases requires to be proved, and this decision, were the judgments of this court now subject to a reversal in the supreme court, we should be bound to follow. But in the exercise of its rightful jurisdiction, it is to the Court of Appeals only that this court is now subordinate, and although the decisions of the Supreme Court must always be treated by us with great deference and respect, yet as they no longer preclude the exercise of our discretion, they cannot be admitted to control our action. We cannot surrender to their authority alone, without a plain dereliction of duty, our own deliberate convictions. We are therefore constrained to say that we cannot yield our assent to a decision which as it seems to us violates the esta-

blished rules of pleading, and is inconsistent with all the prior decisions on this branch of the statute in the courts of the United States, of this State, and of other States of the Union. (*Faw v. Roberdeau*, 3 Cranch, 74; *Fowler v. Hunt*, 10 Johns 464; *White v. Bailey*, 3 Mass. 271; *Little v. Blunt*, 16 Pick. 369.)

In the cases to which we refer it is expressly stated, that when a defendant seeks to avail himself of the statutory bar by pleading his return, he is bound to prove all the facts of which the existence is necessary to render the bar effectual, even where none of those facts, except by implication of law, have been averred in his plea. The want of such an averment cannot therefore be a valid cause of demurrer, since it is an elementary rule that an express averment of material facts is only necessary to be made when it creates an obligation that would not otherwise exist of proving upon the trial the facts that it embraces. The averment is useless, if striking it out, the obligation remains. The introduction of such an averment may not vitiate a plea, but its absence can never justify a demurrer. It was truly said, by the very able judge who delivered the opinion of the court in *Cole v. Jessup*, that the burthen of proving the facts that the law requires to be shown to render the return of a debtor effectual as the origin of the statutory bar, is justly cast upon the defendant, and this observation was evidently the ground of the decision; but it escaped the attention of the learned judge and of his brethren, that according to all the prior decisions, the omission to aver these material facts neither lessens the obligation, nor shifts the burthen of proving them.

As all the exceptions to the third plea have now been examined and found insufficient, the demurrer is overruled.

We are next to consider the demurrers of the defendant to the second and fourth replications to his second plea.

The second plea is a plea of the statute of limitation in the ordinary form, namely, that the causes of action had not accrued within six years next before the commencement of the suit, and the object of the second and fourth replications is to repel the defence by the allegation of facts, which it is supposed will entitle the plaintiff to the benefit of the exception, that the second clause in § 27 of the statute was meant to create. There are objections both of form and substance to each of these replications, that in the result must compel us to allow the demurrers, but without adverting for the present to these objections, we shall proceed to explain our views in relation to the questions that the pleadings were intended to raise, and which upon the hearing were ably and learnedly discussed by the counsel. We adopt this course not only in compliance with the wishes of the counsel as then expressed, but that the plaintiff, should he think proper, may amend his replications in conformity to the opinion that we shall express.

The questions that we propose to consider are, 1st. Whether the new exception that § 27 creates, is confined in its proper application to persons who were residents in this State when the cause of

N. Y. Superior Court.—Ford v. G. & G. W. Babcock.

action accrued, and 2d. Whether in the cases to which this exception applies, it is the first period of absence only, and not successive periods, that must be deducted and allowed.

That the import of these questions and our observations in relation to them, may be properly understood, it will be necessary to transcribe, not only the clause containing the exception, which we are required to construe, but the entire section. It is in these words :

§ 27. "If at the time when any cause of action specified in this article shall accrue against any person, he shall be out of the State, such action may be commenced within the terms herein respectively limited after the return of such person into this State." "*And (which is the clause now to be considered,) if after such cause of action shall have accrued, such person shall depart from and reside out of this State, the time of his absence shall not be deemed or taken as any part of the time limited for the commencement of such action.*" The first clause, as already stated, is a re-enactment of the existing law, but the second was introduced for the first time in the revision of 1830. It is not contained however, in the original report of the revisers, and hence in judging of its meaning, we are deprived of the aid that their notes have frequently supplied.

After an attentive consideration of the clause, we have been unable to discover any valid, or even plausible, reason for confining its application to persons who were residing, or, without being residents, were within the State, when the cause of action accrued. Such assuredly is not the grammatical construction of the words, nor can we believe that this limitation of their obvious meaning, was contemplated by the legislature. Following the strict grammatical rule the words, "such person," can only be referred to the person last mentioned, that is a person who was out of the State when the cause of action accrued, and afterwards returned, thus wholly excluding residents from the exception that follows ; but if we reject this interpretation, as without hesitation we do reject it, as creating an unreasonable distinction between residents and non-residents,—the words "such person" must then be referred to the person first mentioned in the section, that is, any person against whom a cause of action shall accrue, and thus construed, both classes, residents and non-residents, or more properly speaking, persons within and persons out of the State, when the cause of action accrued, are plainly included. It therefore seems to us impossible to deny, that in order to justify the limited construction that would confine the application of this clause to persons against whom the statute commenced to run, at the same time that the cause of action accrued, we must suppose that the legislature has omitted words, which as necessary to carry into effect their manifest intentions, it has become the duty of courts of justice to supply. We must add to the words "such person," the words "being at such time an inhabitant of the state," or others of equivalent import. That such an interpolation in *some* cases may be justified, and in many has been made, we do not deny, but we are firmly convinced that in the construction of statutes, it ought never to be allowed, and in fact has rarely

N. Y. Superior Court.—Ford v. G. & G. W. Babcock.

been made, except when necessary to complete the sense or escape a flagrant absurdity. It ought never to be allowed, unless the intent which it is designed to effectuate, is manifest and unquestionable, and if we depart from *this rule*, judges ceasing to be the mere expounders, will inevitably become the makers of our laws. There is no pretence for saying, in the present case, that the interpolation which we reject, is manifested as the intention of the legislature, either by the terms of the statute or the certain design of its enactment, and for ourselves we are persuaded that its adoption, instead of effecting, would probably defeat, the intentions of the lawgivers, by creating a distinction that was never meant to exist.

In our judgment, to confine the application of the clause, to residents of the state, would be at least as unreasonable as wholly to exclude them and, looking merely to the words of the clause, far more so. We shall be better understood when we shall have explained our views as to the intentions of the legislature, and the true construction of the entire section, as we propose to do, in considering the second question that has been stated.

That question is whether, when a person against whom the statute has commenced to run, departs from, and resides out of the state, the operation of the statute is only suspended until his return, or whether, if during his residence out of the state, there are successive periods of his absence, each must be deducted from the six years which the statute allows to a creditor for the commencement of his suit. Upon the first interpretation, the first return of the debtor not only sets the statute again in motion, but precludes its further suspension; upon the second, the debtor who pleads the statute, must prove that, in the aggregate, deducting the period of each absence, he was six years within the state, after the cause of action accrued, and before the commencement of the suit. Each interpretation is consistent with the language of the statute; the first is the most literal, the second expresses, we believe, the true intention of the legislature, and therefore we adopt it. That it was the intention of the legislature to make an important change in the existing law, has never been doubted, and that we may judge of the nature and extent of the change that was intended, we must look at the actual condition of the law at the time it was proposed. Now there is one rule, that courts of justice, in construing those provisions in the statute of limitations that relate to personal actions, had uniformly followed, and which the words of that statute compelled them to follow, namely, that when the statute began to run, it continued to run, without interruption, until the terms of limitation that the statute prescribes had fully expired. The statute once attaching, no subsequent disability of plaintiff or defendant was permitted to suspend its operation. Thus if a debtor (and it was undoubtedly the relation of debtor and creditor that the legislature had chiefly in view in altering the statute) was in the state when the cause of action accrued, (whether the fact was known or not known to the creditors) the statute commenced to run, and although he departed the next day or hour, and remained

out of the state during the whole residue of the six years allowed by the statute, the lapse of that period was held, in effect, to extinguish the debt, by creating an insuperable bar to its recovery. It is true if the debtor was out of the state when the cause of action accrued, his absence prevented the statute from beginning to run, but his return, by setting the statute in motion, and prohibiting its future suspense, was productive of similar effects—he might remain within the state only for a few days, depart and be absent, for the residue of the six years, and the creditor's remedy was for ever barred.

That this rule was purely arbitrary, and that it was unequal and therefore unjust in its operation, will hardly be denied, and it is important to observe that its injustice was even apparent, and confessed upon the face of the law, as it then stood.

The only reason that can be assigned for permitting the absence of a defendant, when the cause of action accrued, to prevent the statute from beginning to run, is the inability of the plaintiff to prosecute his claims, during such absence, unless by resorting to a foreign tribunal, and admitting the justice of this exception, it seemed a necessary inference, that the same inability when proceeding from the same cause, should be allowed to suspend the operation of the statute, in every case, in which it is proved to exist. In fewer words, if the absence of a defendant when the cause of action accrued, justly prevents the statute from beginning to run, it is equally just, that his absence, after the statute has commenced to run, should suspend its operation.

It is just that the same time and opportunity should be afforded to a plaintiff in all cases for commencing a suit in the courts of this state, that he actually possesses when the defendant is and continues to be a resident of the state. We believe that it was exactly this change that the legislature meant to effect and have effected. We believe that it was their intention to abolish the former, by the substitution of a different rule, more just in its principle and more equal in its operation, and just as universal in its application, embracing every case and all classes of defendants. The rule thus established, we understand to be, that every defendant who pleads the statute is bound to prove that, deducting each interval of his absence, he was within the state six years, (or a shorter period when a shorter is the statutory bar) after the cause of action accrued, and before the commencement of the suit, and that the rule, thus expressed, is subject only to this single and reasonable modification, that where a defendant against whom the statute has begun to run, is a resident of the state and continues to reside therein, his occasional absences are not to be deducted in computing the statutory term. By this construction, the provisions of the statute are rendered plain and consistent, and equal in their operation upon all classes of plaintiffs and defendants, and the change that is made is seen to be, and is vindicated as, real and important. By the opposite construction, that on which the defendant's counsel insisted, the change is rendered trivial and almost unmeaning, the provisions of the statute obscure, and, in a measure, contradictory. The former inequitable rule continues in force as to all

N. Y. Superior Court.—Ford v. G. & G. W. Babcock.

defendants who were out of the state when the cause of action accrued, and, in respect to residents, the rule is not abolished, but only slightly modified; the motives of a change thus partial and unimportant are not to be discovered, and all questions as to the object and intentions of the legislature remain unanswered.

Hitherto, we have not adverted to the actual decisions upon this branch of the statute, and it is with some reluctance that we advert to them at all. They exhibit a conflict of opinions which it is difficult to explain and impossible to deny, and which can only be terminated by a decision of the court of ultimate and controlling authority.

The earliest case is that of *Randall v. Wilkins*, 4 Denio, 577. The defendant who pleaded the statute, resided out of the state, when the cause of action accrued, and continued so to reside until the commencement of the suit, but in this interval he was at various times publicly within the state. The court held that his first return after the cause of action accrued, set the statute in motion, and that it continued to run from that time,—his subsequent departure from and residence out of the state not suspending its operation, thus necessarily deciding that the exception in the second clause of sec. 27, is only applicable to persons who are within the state when the cause of action accrues. *Cole v. Jessup*, (2 Barbour, S. C. R. 309) a case to which we have before referred in its material facts differs not at all from the preceding; but while the court in this case expressed no doubt, and in fact decided that the new exception in the statute applies as well to non-residents as to persons within the state when the cause of action accrues, they held that successive absences cannot be accumulated, for the purpose of being deducted from the full period of time which the statute allows, but that the law is satisfied by deducting the first absence after the cause of action has accrued. They referred, in support of this decision, to a similar decision made by Mr. J. Nelson, in the Circuit Court of the U. States. (*Dorr v. Swartwout*, reported 5 New-York Legal Observer, p. 172.) It is, however, to be observed, that this decision was originally made with great hesitation, and we are credibly informed has since been overruled in the same court.

Directly opposed to those which have been cited, are the decisions to which we shall next advert. The first of these is *Burroughs v. Bloomer*, a case not hitherto reported, but which was decided by the judges of the Supreme Court as formerly organized, during the last year of its constitutional existence. We have been furnished with a copy in MS. of the opinion of the court in this case, from which it appears, that although the questions raised were substantially the same as in the cases first quoted, the conclusions of the judges were widely different.

The learned judge who delivered this opinion examines critically, and in the result wholly repudiates, the opinion of Mr. J. Nelson, in *Dorr v. Swartwout*, and the conclusions which he states, as the grounds of the decision of the court, are, that where a defendant against whom a cause of action has accrued, departs from and resides out of the

state, not only may successive absences be accumulated and deducted, but, in the judgment of law, he is deemed to be absent, during the whole period that he so resides, so that the running of the statute, not merely until he returns, but until he fixes again his residence in the state, is wholly suspended. We refer to this decision as plainly contradicting *Randall v. Wilkins*, and *Cole v. Jessup*, but are not to be understood as assenting to its novel doctrine of constructive absence.

In *Didier v. Davison*, (2 Barb. Ch. R. 477,) we find, at last, that we are supported by high authority in the construction we have given to the statute. Chancellor Walworth is clear in the opinion, that the exception in sec. 27, embraces all defendants against whom a cause of action has accrued, and that where such a defendant has departed from and resides out of the state, each period of his absence, when there are several, must be deducted in determining the question whether the statutory term of limitation has expired, and exactly the same construction must have been given to the statute by this court in the case of *Graham's Executors v. Schmidt*, (1 Sand. Sup. Ch. R. 74,) since it is the only construction by which the decision in that case can be explained and defended. Whether the sad uncertainty in which the true construction of the statute of limitation is now involved, will soon be dispelled, we know not, but if our own views shall finally be declared erroneous, we shall retain the satisfaction of knowing that they coincided entirely with those of Chancellor Walworth, and of the judges with whom we are now associated.

Although the general argument of the plaintiff's counsel in endeavoring to bring his case within the exception of the statute has received our assent, it by no means follows that we can sustain the replications demurred to. They are fatally defective. The second replication is plainly argumentative. It leaves us to collect, by inference, material facts that ought to have been explicitly averred: it avers that the defendants resided in the State of Louisiana, when the causes of action accrued, but does not aver that they were at that time out of this state; and if at that time they were in this state, although residing in Louisiana, it was then that the statute began to run. Nor are the several departures from, and returns into the state of the defendants, stated with the precision and certainty that the law requires. Their existence is supposed, certainly, not averred.

To the fourth replication, we shall state a single but very decisive objection. It attempts to exclude the defence of the statute by averring that the defendants were not residents within this state for a term of six years, in the aggregate, before the commencement of the suit, thus assuming that a residence of six years within the state, is necessary in all cases to complete the statutory bar,—a construction of the statute which, although not absolutely novel, we unhesitatingly reject, as repugnant alike to its spirit and its language. Residence is not necessary in any case, either to set the statutory term in motion, or to continue, or revive, its currency.

In conclusion, the plaintiff's demurrer to the third plea is overruled.

N. Y. Supreme Court.—Wilson v. Allen and others.

The demurrers of the defendants to the second and fourth replications to the second plea are allowed, with liberty to the plaintiff to reply to the third plea, and to amend or withdraw his insufficient replications, within the usual time. We strongly advise the plaintiff's counsel, instead of amending, to withdraw entirely his replications, and content himself with a general traverse of the second plea, since it is quite certain, that under this traverse, he may give in evidence all the facts upon which he relies as overruling a defence upon the statute.

No costs are given, as we understood, the counsel to agree that whatever might be our decision, none were to be claimed.

N. D. Supreme Court.

[*Albany Special Term.*]

Before Mr. Justice HARRIS.

GILBERT L. WILSON, *Receiver, &c.* against FREDERICK W. ALLEN
and others.—7th August, 1849.

COSTS IN CASES OF APPEAL TO THE SUPREME COURT—COSTS OF TERM.

Where a judgment was affirmed upon appeal at the general term:—Held, that the costs prescribed by the 6th subdivision of the 307th section of the Code should be allowed. Where a plaintiff had noticed his cause for argument at the Albany general term for the first Monday of March, and the defendant afterwards noticed it for the Saratago general term to be held on the *same day*—It was held that the plaintiff was not entitled to the costs for *each* of those terms.

THIS was a motion to strike out of the judgment certain costs alleged to have been improperly inserted therein by the clerk. The action was tried by a referee, who made a report in favor of the plaintiff, upon which judgment was perfected. The defendants appealed to the general term, and upon such appeal the judgment was affirmed. When the judgment was entered, the defendants objected to the allowance of any costs upon the appeal, upon the ground that none were allowed by law. The objection being overruled by the clerk, some items were objected to, which are noticed in the opinion of the court. The clerk allowed \$65 for costs upon the appeal, and \$12,29 for disbursements and interest upon the report.

E. F. Bullard, for defendants.

G. L. Wilson, in person.

By the Court.—HARRIS, J.—The decision of this motion involves an important and somewhat difficult question, arising upon the 6th

N. Y. Supreme Court.—Wilson v. Allen and others.

subdivision of the 307th section of the Code. If the last clause of that subdivision is to be literally applied, it follows that at least \$45 of the costs allowed by the clerk must be stricken out of the judgment.—Then the only costs which could be allowed to the plaintiff, would be ten dollars for each term of the court at which the cause was necessarily on the calendar, and postponed or not reached, allowable under the 8th subdivision of the same section, and the disbursements which may be allowed under the 311th section. Then, indeed, no other costs can be allowed, or any appeal from an inferior court to the Supreme Court, or from a *judgment* entered upon the direction of a single judge to the general term of the same court. No one can fail, I think, upon an examination and comparison of the various provisions of the Code, upon the subject of costs, to come to the conclusion that, whatever else may have been the intention of the legislature, such *was not* their intention.

With the exception of this single clause, all the provisions of the Code relating to costs upon appeal, are consistent and harmonious: the same security for costs is to be given upon an appeal from an inferior court to the supreme court, or a judgment rendered by a single judge to the general term, as upon an appeal to the court of appeals—And yet why require such security for costs, when no costs, or none but disbursements, may be recovered? The amount of costs, too, recoverable upon appeal in the different courts, is graduated according to the dignity of the court and the probable expense of employing counsel. Upon an appeal from a justice's judgment to the county court, it is *twelve* or *fifteen* dollars, as the judgment is affirmed or reversed. In the supreme court, the amount is \$45; and in the court of appeals \$75. But why, it may be asked, should \$45 be fixed as the amount of costs on appeal in the supreme court, if it was intended that no costs should be recovered; or, why should the prevailing party in the county court and in the court of appeals recover costs, when in the same case no costs are given in the supreme court?

Again, it is provided by the 306th section, that when, upon an appeal, *a new trial shall be ordered*, the costs of the appeal shall be in the discretion of the court. But if the 6th subdivision of the next section is, by its last clause, rendered inapplicable to appeals from judgments, how is effect to be given to this provision of the 306th section? Costs, in case of a new trial, are in the discretion of the court; but what costs? The only costs upon appeal are fixed by a provision declared to be inapplicable. Suppose, then, a new trial ordered upon appeal, and the court, in the exercise of its discretion, think proper to award costs to the prevailing party, What are the costs he is to recover? Clearly nothing, unless the 6th subdivision of the next section defines them. But to allow that subdivision to determine the costs to be recovered, when awarded upon ordering a new trial, would be, in effect, saying that at least, *in some cases*, "*its provisions* shall apply to appeals in cases other than those mentioned in section 349." So, too, it is provided that, when a judgment upon appeal is affirmed in part and reversed in part, the costs shall

be in the discretion of the court. This provision also must become inoperative, so far as it relates to appeals in the supreme court, if the application of the 6th subdivision of the 307th section is to be controlled by the last clause. In short, if this effect be given to that clause, it renders the provisions of the 306th section, so far as they relate to appeals in the supreme court, wholly ineffectual. I cannot believe that the legislature ever so intended.

But suppose, for the sake of harmonizing and giving effect to all the provisions we find upon the subject, we allow the 306th section so far to limit the operation of the 6th subdivision of the 307th section as to leave that subdivision applicable to the particular cases mentioned in the 306th section, the difficulty will not be diminished. The inconsistency will still remain, of allowing costs upon a partial reversal, when none could have been recovered if the reversal had been entire. If this construction be given to these provisions, a party appealing would rarely prefer to have a complete reversal. He would choose to have enough of the judgment affirmed to enable the court to exercise its discretion and give him costs. In that case, too, no costs would ever be recovered against the party appealing, when the judgment is affirmed. Such inconsistencies, not to say absurdities, never were intended by the legislature.

But again: suppose we allow the last clause of the 6th subdivision to operate upon the preceding provision in the same subdivision, in the full literal sense of its terms, let us next inquire what would be the practical operation of the provision thus qualified and restricted. We have seen that it could not operate upon an appeal from a judgment rendered in an inferior court by a single judge. Upon what then could it operate? Nothing, I apprehend, unless it be the cases mentioned in sec. 349. Suppose it to operate in fact, upon that class of cases. The absurd consequences which would follow from such a construction are too obvious to require illustration. A party would recover costs upon an appeal from an order affecting, in the slightest degree, the merits of the action, when no costs could be given upon an appeal from a judgment involving the whole merits of the controversy.—Costs would be awarded, and liberally too, upon an appeal from an order affecting a mere provisional remedy, when none would be provided upon an appeal involving a final determination of the rights of the parties. But would the provision have even this effect? I think not. The title of the code, in which this provision is found, commences with abolishing the fee bill then existing, and declaring that certain allowances, to be termed costs, shall be made, by way of indemnity, to the *prevailing party, upon the judgment*. The 304th section declares that in certain actions, including nearly, if not all the actions, which, under the former practice, would have been actions at law, as well as some equitable actions, the plaintiff, upon a recovery, that is, as I understand it, if he be the prevailing party upon the judgment, shall be allowed costs of course, as a matter of right. The next section, the 305th, declares that the defendant, if he prevails in the same actions, shall be entitled to costs. The 306th section declares

in what cases costs shall be awarded in the discretion of the court. These three sections are evidently intended to regulate and determine the rights of the parties in respect to costs in every action. They relate exclusively to costs upon a *recovery*. They determine the right of the prevailing party to costs *upon the judgment*. No allusion is made in either of these sections to costs to be awarded upon a motion. Having thus declared when and to whom costs shall or may be awarded in rendering judgment upon a recovery in the action, the 307th section proceeds to declare what shall constitute the costs so to be awarded, and the 311th section directs the manner in which the costs, *as above provided*, shall be inserted *in the entry of judgment*. All these provisions clearly relate to the costs which the prevailing party is to recover *as a part of his judgment*, as distinguished from the costs which may be allowed upon a motion, and for which provision is subsequently made. That the legislature understood these sections as exclusively applicable to costs upon judgments, is further evident from the fact that in one instance it was thought proper to extend their provisions to another case. By the 318th section it is provided that when the decision of a court of inferior jurisdiction in a *special proceeding* shall be brought before the supreme court for review, such proceeding shall, *for the purposes of costs*, be deemed *an action at issue*, on a question of law from the time the same shall be brought into the supreme court. It is unnecessary here to inquire whether any provision has been made for bringing such a proceeding into the supreme court for review. But assuming that it may be brought there, the legislature, regarding the provisions they had made for costs as applicable to such a case, adopted the section referred to with a view to bring the case within those provisions. So that now, such a proceeding, when brought into the supreme court, being, for the purposes of costs, regarded as an action at issue upon a question of law, the prevailing party would be entitled to costs under the 307th section.

The conclusion to which I have been led by this examination, is that, whatever else the legislature intended, *it did not intend* that the provisions of the 6th subdivision of the 307th section should be applicable to an order made by a single judge upon motion. This being so, it follows, if its provisions are not applicable to other appeals, that this subdivision is wholly inoperative—the restricting clause destroys its whole effect.

It is one of the established rules governing the construction of statutes, that if possible, effect should be given to each part, so that, if it can be prevented, no clause, sentence, or even word may be regarded as superfluous, void or insignificant. It is also a rule, equally well established, that such a construction ought to be put upon a statute as will best give effect to the intention of the lawgiver. It was said by Thompson, Ch. J., in the *People v. The Utica Insurance Co.* 15 Johns., 380, that “a thing which is within the letter of the statute is not within the statute, unless it be within the intention of the makers.” I have already shown, conclusively I think, that the clause which is the occasion of this examination, is not only opposed

to the general scope and object of the provisions of the code relating to costs, but it is also absolutely incompatible with several other provisions. And more than this, that if this clause, in the fair import of its terms, is to prevail, it is itself destructive of the entire subdivision in which it is found. Under these circumstances I must, under the guidance of the rules which regulate in the exposition of statutes, reject the clause altogether as totally and irreconcilably repugnant to the manifest intention of the legislature as expressed in every other part of the same act relating to the same subject.

It was said by Lord Coke, that great questions had often arisen "upon acts of parliament, overladen with provisos and additions, and many times on a sudden penned or corrected, by men of none, or very little judgment in law." It needs but the perusal of the code to see that this ground of complaint was not confined to the days of Lord Coke. A signal instance of the incautious haste with which "provisos and additions" are sometimes penned and adopted, is presented in the very title which is the subject of this review. The 322d section declares, that upon the settlement of any action mentioned in section 304, no greater sum shall be demanded from the defendant as costs, *than at the rates prescribed by that section*. Taken as it stands, the section is utterly nugatory and unmeaning. It does not express the intention of the legislature or the person who drew it. It was undoubtedly intended to refer for the measure of costs in the cases specified in that section to the 307th section, and it will probably be so construed. But inadvertently the framer of that section, instead of using at the end, the words "by the 307th section," said "by that section," and the legislature, without perceiving the mistake, adopted it. So, if I could be allowed to go out of the act itself, I might refer to the history of the clause I have been constrained to reject, as it is generally understood, to show that it was inserted, as an amendment, *ex cautela*, for the very purpose of preventing the provision to which it was intended it should apply from being, by construction, made applicable to appeals in cases mentioned in section 349, and by some mistake in preparing or transcribing the amendment the word "not" was inserted instead of "only."

I shall, therefore, hold in this case, that upon the affirmance of the judgment upon appeal, the plaintiff became entitled to the costs prescribed by the 6th subdivision of the 307th section of the Code. But the defendants are entitled to have \$10 stricken out of the judgment. After the plaintiff had noticed the cause for argument at the Albany general term, to be held on the first Monday of March, the defendant noticed it for the Saratoga general term to be held on the same day. I think the plaintiff is not entitled to the costs prescribed by the 8th subdivision of the 307th section for *each* of these terms. The cause was not *necessarily* or even properly on the Saratoga calendar. Neither party should have costs upon this motion.

English decisions—Court of Exchequer. *Regina v. Wood.*

SELECTIONS FROM RECENT ENGLISH DECISIONS.

Court of Common Pleas.

CAUNT v. THOMPSON.—14 Feb. 1849.

BILL OF EXCHANGE.—NOTICE OF DISHONOR.

Where a bill was presented to the defendant who was the drawer, as the executor of the acceptor, *semble*, no notice of dishonor is necessary, although notice is necessary and knowledge alone is insufficient.

THIS was an action of assumpsit on a bill of exchange brought by the endorser against the drawer. The defendant pleaded that no notice of dishonor had been given. The defendant was the executor of the acceptor, and the bill in question had been presented for payment to him as executor. A rule had been obtained, calling on the defendant to show cause why a verdict should not be entered for the plaintiff, on the issue which denied the want of notice.

BY THE COURT :—There is no distinct form of words required to prove a notice of a bill having been dishonored, but notice was necessary to be given, and knowledge of dishonor was insufficient. The case of *Solarte v. Palmer*, (1 Bing. N. C. 194,) has not been strictly followed. The bill in this case was presented to the defendant *in propria persona*, and he therefore knew it was dishonored; the plaintiff is, therefore, entitled to have the verdict entered for him on this issue.

Court of Exchequer Chamber.

REGINA v. WOOD.—30 April, 1849.

APPROPRIATION OF FOUND CHATTEL.—FELONIOUS INTENT.

Upon Error to the Exchequer Chamber; it was held that as the finding of a chattel under the circumstances, could not have been with any felonious intent to commit a larceny—the subsequent conversion was free also from the same; and conviction ordered to be quashed and judgment arrested:

UPON an indictment for stealing a bank note, which the prisoner had picked up in the highway, and converted to his use, it appeared that when he picked up the note, he did not know to whom it belonged, but that a few days afterwards he heard who was the owner, and then changed the note and appropriated the proceeds. The prisoner was found guilty, but Mr. Baron Parke, who presided at the trial at the Huntingdon Summer Assizes, reserved the point for the consideration of the Court, whether there was any felonious intent.

BY THE COURT :—In the first instance the prisoner could have no felonious intent to commit larceny, and there was therefore, none in his subsequently converting it. The conviction must therefore be quashed and judgment arrested.

 Review.—Smith's Commentaries.

PRACTICAL POINTS.

MISCHIEVOUS ANIMAL.

A person who keeps an animal to attack and bite mankind, with knowledge that it is accustomed to do so, is *prima facie* liable in an action on the case, at the suit of any person attacked and injured by such animal, without any averment in the declaration of negligence or default in the securing or taking care of it. The gist of the action, said the chief justice, is the keeping of the animal after knowledge of its mischievous propensities. *May v. Burdett*, 9 Queen's B. 101.

Review.

SMITH'S COMMENTARIES ON STATUTE AND CONSTITUTIONAL LAW.

Commentaries on Statute and Constitutional Law, and Statutory and Constitutional Construction, containing an examination of adjudged cases on Constitutional Law, under the Constitution of the United States, and the Constitution of the respective States, concerning Legislative power, and also the consideration of the rules of law in the construction of statutes and constitutional provisions. By E. FITCH SMITH, Counsellor at Law. Albany: published by Gould, Banks & Gould, Law Booksellers, 104 State-street, and by Banks, Gould & Co., 144 Nassau-street, New-York. 1848.

We have for some time past intended to direct the attention of the legal profession to the Honorable E. Fitch Smith's "Commentaries on Statute and Constitutional Law and Constitutional Construction." Instead of a review of these Commentaries, we have concluded to present to our readers some of the many testimonials which, at our request, the publishers have furnished us. In the "Belknap Gazette," published in New-Hampshire, we find these Commentaries thus alluded to:—

"*Mr. Editor*,—Permit me, through the columns of your useful paper, to congratulate the profession upon the appearance of the Hon. E. Fitch Smith's "Commentaries on Statute and Constitutional Law."

The five first chapters in this learned work, contain the origin and history of legislation among the ancient governments—of legislation in England—of legislation in the colony of Virginia—of legislation in the colonies of New Plymouth and Massachusetts Bay, and in the Connecticut colony—and then proceeds, 6thly, to treat of the legislative power of the States, and the bills of rights of the respective States. Chapter 7th, of legislative authority irrespective of any constitutional restrictions upon legislative power, &c. Eighth, of constitutional restrictions upon legislative power, under the constitution of the United States—first, as applicable to the Federal government, and second, as applicable to the State governments, and the construction put upon such restrictive clauses. Ninth, of constitutional restrictions upon legislative power, under the constitutions of the respective States, and the construction of such restrictive clauses. Tenth, of legislative and judicial interpretation. Eleventh, of the division, qualities and incidents of statutes. Twelfth, of interpretation and construction of particular words. Thirteenth, of contemporaneous exposition. Fourteenth, of statutes in *Pari Materia*. Fifteenth, of affirmative and negative statutes. Sixteenth, of equitable construction of statutes. Seventeenth, of equitable construction of *Penal* statutes. Eighteenth, of the construction of *Penal* statutes. Nine-

Review.—Smith's Commentaries.

teenth, of the repeal of statutes. Twentieth, of public and private statutes ; and twenty-first, of the proofs of the existence of statutes.

It will at once be seen how indispensable a thorough knowledge of the subjects treated of in this work, is to every lawyer and legislator. The works of Judges Kent and Story upon the several subjects found in Judge Smith's Commentaries, have been read with much pleasure and instruction. But those works combined, do not present but parts of the great whole treated of in the Commentaries under consideration. The latter may well be called an *American work*, written in the true spirit of our free institutions, based upon American authorities, supported by lucid arguments, drawn from the vital principles of our government, and such constructions as have long received the unqualified approbation of our own judiciary. After some examination, I hope not to render myself obnoxious to contradiction, by saying, that after the careful perusal of these Commentaries, every jurist will cheerfully acknowledge the superiority of this work, over any others now extant, treating upon the same general subjects.

I have now no time, if I had the ability, to make an analytical review of Judge Smith's very useful Commentaries. My only design in taking up the pen upon this subject, was to call the attention of the public, and jurists in particular, to this new and valuable treatise, with a view of conferring a favor, and rendering some service, by the information, to those who are supposed to be more directly interested in such a work. I hope the distinguished author will receive a reward commensurate with the great amount of labor and splendor of achievement."

We understand the article above quoted emanated from the pen of the late attorney general, a distinguished and learned constitutional lawyer.

The following extracts are taken from the August number of Hunt's Merchants' Magazine :

" *Smith's Statutory and Constitutional Law*.—A work, fully and ably treating the subject of that whose title we give below at length, has been much needed, and the learned labors of Mr. Smith have resulted in an exceedingly seasonable publication. Of one fact the book furnishes conclusive *prima facie* proof, and a refutation of a prevailing notion. We are often told that the days of profound scholarship, of "learned tomes," (as the phrase runs,) are gone. But that, in one branch at least of human learning, there are still to be found deep thought and patient study, such books as these Commentaries conclusively prove ; and if we are told that we have no longer the huge folios of former days, we answer, that the fashion, rather than the size of the volume, has changed, and we point, for proof, to Mr. Smith's octavo of a thousand pages.

"The direction of modern legal scholarship has changed, but it has lost nothing in profundity. No longer puzzling over the subtleties of the schools, it finds enough to do in grappling with the momentous questions and pressing interests of the present ; and no longer finding time for the refinements of a logic which afforded gratification to a learned complacency, rather than yielded practical good, it has need of all its time and powers to keep up with the developments of an active age, and in endeavoring to reduce to rule and system the notions and opinions, the necessary modifications of old rules, called forth by new events and the changing aspect of society.

"We speak not only with reference to our own country when we call this work seasonable. At a time when all Europe is convulsed with movements, the whole aim and end of which are constitutional change, the shifting of the supreme power of States off one basis on to another, with fundamental changes ; in short, the inquiry into the sources, nature, extent and limits (if

limits there be) of this supreme power of States, becomes momentous and vital. When we consider that it has been for years a mooted point whether there be in fact limits to the power of the legislative or law-making authority, and how pertinaciously the doctrine of the omnipotence of Parliament, (as English writers call it) has been attacked and defended, we see how fundamental, and at the same time unsettled, are some of the questions connected with this subject. One of the most interesting and elaborate chapters of this work is devoted to this question. Mr. Smith has brought together the opinions of the great text writers on the subject—those of Burlamaqui, Woodesson, Domat, Blackstone and others on one side, and those of Vattel, Locke, and Hall on the other, and then proceeds to examine, in detail, the leading American authorities, of both State and Federal Courts.

"We commend this work, and the subject which it treats, to the study, not only of the American lawyer, but of the American legislator, the American merchant, and, we may add, to every citizen who, as a voter makes a unit in that aggregate of popular will which expresses itself by acts of legislation."

The Hon. Lewis H. Sandford, in a letter to the publishers, says:—"I have examined with much interest Judge Smith's "Commentaries on Statute and Constitutional Law."

"The work treats of subjects upon which an elementary treatise has long been needed, and in a manner that cannot fail to commend it to the approbation of legislators as well as lawyers and jurists.

"The great subject of legislative power, as restricted by written constitutions, and especially as it exists independent of those restraints, is discussed with boldness and commanding ability, and the portion of the work devoted to the exposition of statutes, their classification and their distinctive traits and operation, is at once eminently practical and thoroughly digested.

"I can with pleasure recommend the work to the bar and the public."

Another distinguished jurist says:—"This subject so ably treated is one of the highest interest and importance not only to the lawyer and jurist, but to the legislator and statesman, and must commend this work to the diligent study of all those who aspire to an accurate knowledge of the science and true principles of legislation."

A gentleman of high eminence at the Boston bar pronounces these Commentaries "an able, learned and highly satisfactory treatise."

The attorney-general of Alabama says:—"I have been highly delighted in their perusal; I entertain the opinion and have no doubt that ere long they will be in high esteem amongst the legal profession."

A juridical writer says:—"Such a work as this has been much needed. In it are discussed, and that in a most able manner, the law and rules of construction of constitutional and statutory enactment. It opens and enters in a bold manner upon a subject which under our free and republican institutions presents a wide and interesting field for the exploration of the legal student and juridical scholar in the exercise of judicial and professional learning, and is worthy the careful and attentive perusal of all those who desire an accurate and just apprehension of the genuine policy and real philosophy of our happy and peculiar institutions, or the true basis of human rights upon which they are founded."

Our space will not admit of further extracts at present. We would add, in our opinion, the work of Judge Smith evinces an intimate and accurate acquaintance with constitutional law and other subjects of which he treats. We find in it the impress of a clear and discriminating mind, legal ability as a juridical writer, unsurpassed by few writers of the present day. From

Review.—Smith's Commentaries.

the learning and talent exhibited in the numerous judicial opinions of this author, which we have heretofore published, we had reason to expect that a work emanating from his pen would be one of real intrinsic merit. Our expectations in this respect have been fully realized.

These Commentaries also contain an unusual amount of original matter. We were much gratified in the perusal of the logical and impressive argument contained in the opening of chapter nine; in which the author discusses the important constitutional question—"What is a bill (within the meaning of our constitution) appropriating the public monies or property for local or private purposes."

The concluding part of chapter seven, from sections 149 to 173, both inclusive, contains one of the most bold and masterly arguments which has ever fallen under our observation, upon the difficult and intricate question, "As to the power of the legislature irrespective of any constitutional restrictions to pass *retrospective* laws which shall have a *retroactive* effect."

That portion of the work which relates to the consideration of the construction of statutes, is of great practical interest and utility to the profession, and in it will be found evidence of great research and of a legal erudition of no ordinary cast. The author has certainly rendered to the profession great and valuable service in this branch of juridical science, and what has been done, has been well and scientifically done.

We will conclude this notice by giving to our readers as a specimen of the author's argumentative style, some extracts from the work itself. In discussing the question as to the influence which a legislative exposition of a constitutional restriction upon its own powers should have in the construction of such a provision, we find the following comments:—

"If a legislative exposition of a constitutional restriction upon its own power, is to receive so much respect as to be of controlling force, binding and authoritative upon those whose duty it may be to pass upon the constitutionality of a particular legislative act, or is to be received as evidence of a true construction, then the constitutional restriction imposed may, by the mere force of such construction, be rendered ineffectual in restraint of those upon whom it was intended as a check. This would be carrying the doctrine of legal nullification to an extreme unprecedented in the history of any government. If we concede to the legislature this judicial attribute and make its exercise evidence of what the constitution is, then the power restricted has only to pronounce several successive erroneous judgments, and thus elude the restriction by legislative exposition. This would be carrying the doctrine of legislative omnipotence to a greater extent than was ever claimed even by a British parliament. The parliament of England rests its claim to omnipotence, upon the fact that it is unfettered and unrestricted by a written constitution, expressive of the will of its constituents, that it stands in the place of the people, and speaks the language of absolute sovereignty; hence, that its powers must of necessity be transcendental and omnipotent in the scale of political existence, and therefore can mould the constitution at its will: 'It is far otherwise under our form of government. The spirit, genius, and policy of our political institutions, rest upon principles which are at war with the doctrine of legislative omnipotence; ours is a government founded upon an express written compact, reduced to exactitude and certainty, expressive of the sovereign will of the people, fixing the limit and marking the bounds of legislative authority and power. The legislatures instead of being omnipotent, must yield to its force, submit to its restraint, and bow to its authority. This written compact originated in a spirit of distrust of legislative authority, and from a conviction that legislative omnipotence was but another name for despotism. The evidence of that will, rests not in the volition or judgment of those intended to be restricted by its own omnipotent fiat.

Under our form of government, the legislature is the creature of the constitution, it owes its existence to that instrument, it derives its power from it; that is, the voice of the people, in their original and unlimited capacity, fixing the limits of legislative power. It is the mandate of the Creator, directed to, and obligatory upon the creature; its authority is alone sovereign, absolute and supreme. If the creature of the consti-

Obituary.

tation, can pass judgment upon its obligations, and its judicial determination of its powers be clothed with the attributes of a judicial exposition, authoritative and of controlling force, then legislative omnipotence in this country would exceed that of the British parliament to an extent at least commensurate with the force of a written constitutional restriction, which it weighs down by the force of its judicial expositions—while the energies of parliament are only directed to the exercise of powers unlimited and uncontrolled, legislative power in this country would go much farther; it would break the fetters the constitution has wrought out, throw off the restraint it has sought to impose, and annihilate the written will of the people. Parliament never carried its arrogance to such an extent; it never, except in days of revolution, nullified the written will of the people it represented by the force of parliamentary exposition: it never trod under foot a written compact: it never sat in judgment in its own cause, and demanded for its decision in such case, respect paramount to *Magna Charta*. The utmost stretch to which legislative exposition can be carried, is, that it may be considered and respected; it may be consulted as an index to other minds; it may be regarded as the embodiment of the views of predecessors, or of one department of the government. But this respect cannot be clothed with the attribute of judicial authority. The evidence of what were the views and opinions of others can never make those views and opinions evidence that they were right, it can never ripen a wrong opinion into a right one."

"If it be admitted that legislative exposition is to be respected and implicitly followed; if the constitution is thus to be made subordinate to the legislature; if a short and feeble chain of precedent is to be deemed adequate to control the judgment and fetter the conscience of the representative sworn to support the constitution; if that sacred instrument can be thus expounded away; it is but to little purpose, that we live under a government having a written constitution, 'which is fixed and certain, expressive of the paramount will of the people, intended as the supreme law of the land, and to be of a force adequate to fix the limits of legislative authority, and define the boundaries of legislative power, or to prescribe the orbit in which it must move.' Such a doctrine subverts the principle that 'the constitution is paramount to legislative power, subject to be revoked or altered only by the power that made it—that the life-giving principle, and the death-giving stroke must proceed from the same hand.' For, then, instead of 'the constitution fixing the limits of legislative authority, and prescribing the circle in which it must move,' the legislature become to the constitution the sun, around which it must revolve, and upon which it must be dependant for its existence. Such a doctrine strikes a death blow to the long cherished opinion 'that the constitution of a state is stable and permanent, not to be worked upon by the temper of the times, not to rise and fall with the tide of events, notwithstanding the competition of opposing interests, or the violence of contending parties.' Instead of its 'remaining firm and immoveable as a mountain amid the strife of storms, or a rock in the ocean amid the raging of waves,' it becomes a frail bark, which may be rocked by the surges of political strife—be tossed and shattered by every breeze which ambition or avarice it may excite—and it will become a total wreck, whenever it shall have encountered three or four successive mutilations upon the quick-sands of legislative precedent."

OBITUARY.

Death of Mr. Justice Coltman.—At his house in London, (England,) on the 11th of July, Sir Thomas Coltman, one of the Justices of the Court of Common Pleas. Sir Thomas was called to the Bar on the 24th May, 1848, by the Society of Lincoln's Inn, and succeeded Mr. Justice Gaslee as one of the Justices of the Common Pleas in Hilary vacation, 1837. He was the Senior Judge of the Court.

He was educated at Rugby and obtained an exhibition at Trinity College.

We understand that Mr. Serj. Talfourd succeeds Sir Thomas as Justice of the Common Pleas.

THE
New-York Legal Observer.

VOL. VII.]

NEW-YORK, OCTOBER, 1849.

[MONTHLY PART.]

PROMISSORY NOTE.—NOTICE OF DISHONOR.

HOW, AND FOR WHAT?

"WHERE a notice misdescribes the note in some particular, it may be shown in aid of the defect, that there was no other note in existence to which the description contained in the notice could be applied."—One of the head notes to the case of *The Cayuga County Bank v. Warden & Griswold*, 1 Comk. R. 413.

For the establishment of what *legal principle* may it be shown that there was no other note in existence, to which the description contained in the notice could be applied, and how and in what way does *that aid the defect*?

The head note admits and establishes the following propositions:

1. That the notice misdescribed the note—that is, it did *not* describe the note in question.
2. That the notice was defective and insufficient in and of itself to charge the defendants as endorsers of the note in suit.
3. That a defective and insufficient notice may be aided—and it undertakes to state how and in what way it was aided in the particular case under consideration, viz.: by showing that there was no other note in existence* to which the description contained in the notice could be applied.

The legal principle to be deduced from the foregoing propositions is—That the holder of a promissory note is under no obligation to describe *the* note in the notice of dishonor, in order to charge the endorser, but, that the notice is sufficient if it describe any *supposed* contract, provided no such contract in fact exists—that describing an *imaginary* contract in a notice of protest is as good as describing *the real* contract, and will charge the endorser the same as though the *real contract had been described*. It follows, then, as a legal proposition, that the more absurd and ridiculous the contract described in

* No such fact was proved as is assumed in the head note. The fact proved was, "that the note in question was the only note in the bank, made by S. Warden and endorsed by the defendants," and not "that there was no other note in existence to which the description contained in the notice could be applied."

Promissory Note.

the notice is, the greater is the probability that it will be sufficient, for the chances of not describing a real contract will be increased according to the absurdity and ridiculousness of the contract described. There is no other contract in existence which it does describe, *therefore* it describes the one in question, and is a sufficient notice of dishonor to charge the defendants as *joint* endorser of a *six hundred dollar* note.

An artist is employed to draw the likeness of the reporter who drew the head note above mentioned. He fails. The likeness is defective. It does not resemble him, but there being no living creature in existence which it does resemble, *therefore* it is a good likeness of the individual "intended to be referred to."

The opinion delivered, however, sustains no such proposition as is stated in the head note. That presents a very different question, and makes the liability of the endorser to depend on the state and condition of his mind, and not on the fact whether the note is or is not described in the notice of protest, and hence one kind of notice is as good as another; and if there had been a note in existence to which the description contained in the notice could have been applied, still the notice would not thereby have been defective and insufficient to charge the defendants as endorsers of the note in question, provided the court had thought, *as a question of law*, that the notice when received conveyed to the minds of the defendants information that the identical note in question had been dishonored. True, it might require a different state of "accessory facts" to induce the court so to decide, but *the rule of law would remain the same*. The liability of the endorsers would still depend on the question, whether the notice when received conveyed to their minds information, that the identical note in question had been dishonored, and the court could as well decide, *as a question of law*, that it did, and perhaps as correctly, when other notes existed to which the description contained in the notice could be applied, as when they did not exist.

The giving in evidence the "accessory facts," was not for the purpose of contradicting the terms and conditions of the written contract, or to vary the reading of the written notice of protest, but for the purpose of enabling the court to determine, as a question of law, whether, under the circumstances of that particular case, the defendants were, on the receipt of the notice, thrown into that state and condition of mind, which rendered them liable to pay to the president, directors, and company of the Cayuga County Bank, the sum of six hundred dollars, with interest on the same from the third day of May, eighteen hundred and forty-five, together with the sum of seventy-five cents to the notary for thus throwing them into that state and condition of mind, by the service of a notice of protest which was defective on its face to carry information to them of the non-payment of the note in question.

LEGES.

PRACTICAL POINTS.

BILL OF EXCHANGE—NOTICE OF DISHONOR.

IF a holder of a dishonored bill sends a messenger once in due time, and during business hours, to the place of business of a party who is entitled to receive notice of the dishonor of such bill, for the purpose of giving such notice, and there be no one in attendance to receive it, that is equivalent to a verbal notice of dishonor. *Allen v. Edmonson*, 2 C. & K. 547.

CARRIER—LOSS OF PARCEL—EVIDENCE.

IN an action against a carrier, for the loss of a parcel, the defendant pleaded that it was not delivered to him to be carried. The court of exchequer held that it was sufficient for the plaintiff to show that it was delivered to a person and at a house where parcels are in the habit of being left for the carrier.

The court said, it was immaterial whether the person was paid any money or not; and in such an action the person who so left the parcel may be asked, on his cross-examination, what direction was on the parcel. *Black v. Bazendale*, 1 Exch. 410.

TO THE EDITOR OF THE LEGAL OBSERVER :

Sir,—Allow me to call attention to the English use of the doctorate LL. D. Its usage certainly has high authority. The reviewer of Duer's *Marine Insurance*, in the *London Law Magazine*, or *Quarterly Review of Jurisprudence*, whose contributors are ornaments to the English bar and bench, when having occasion to use the name of the author, fails not to use his well-deserved title, and calls him *Doctor Duer*. Now, why is this? In no case, either in conversation or in writing, in this country, do we see used the title Doctor, as a prefix to the name of the individual upon whom has been conferred the degree of LL. D. It is not so in the clerical profession; the title of D. D. is always used by the clergy themselves, and hence its use also by the laity. Let the legal profession adopt its use, (it is an honorable use,) and our doctors of law, whose titles seldom reach beyond the triennial catalogue of the college, or the title-page of a book, will share equally, in honorable consideration, with our doctors of divinity.

H. D.

N. Y. Superior Court.

[January Term, 1849.]

Before OAKLEY, Chief Justice, and VANDERPOEL and SANDFORD, Justices.

FULLER V. EMERIC.—20th January, 1849.

The writ of *ne exeat*, or equitable bail, is abolished by the code of procedure. Arrest and bail, as provisional remedies in civil actions of an equitable nature, can be obtained only in the cases, and in the manner prescribed by the code.

THE defendant was arrested under an order in the nature of a *ne exeat*, made by one of the justices of the court in August last, in a suit to settle a partnership, and to prevent him from wrongfully removing the effects of the firm. He now moved for a discharge from the arrest.

E. C. Benedict, for the plaintiff.

E. Sandford and *F. R. Tillou*, for defendant.

By the Court.—SANDFORD, J.:—The code of procedure declares that it is expedient to abolish the distinction between legal and equitable remedies, and thereupon enacts that all remedies in courts of justice, shall consist of two classes, viz : actions, and special proceedings.

Actions are divided into civil and criminal.

This suit is therefore a civil action, as defined and established by the code of procedure.

The seventh title of the code, is devoted to "The provisional remedies in civil actions," and three are treated of at large. These are, 1. Arrest and bail. 2. Claim and delivery of personal property ; and 3. Injunction. Under the first head, § 153, provides that "no person shall be arrested in a civil action, except as prescribed by this act." Some exceptions are made, which are not applicable to this case. The chapter then proceeds to define the cases in which the defendant may be arrested, and the manner of obtaining such arrest. The complaint in this case was not framed to set forth either of the cases defined in the code, and in sustaining the arrest made, but little reliance was placed upon this ground.

The defendant's arrest was upon an order of a justice of the court in the nature and form of a writ of *ne exeat*, as practised in the late court of chancery. It directed the sheriff to cause the defendant to come before him and give sufficient bail or security in two thousand dollars, that he would not depart out of the jurisdiction of the state, &c., and in default of such bail, to commit him to the common jail until he should do it of his own accord.

The effect of the order was, to arrest the defendant in a civil action, and as we will assume, in a case for which the chapter of the code touching arrest and bail does not provide.

 N. Y. Superior Court.—Amoskeag Man. Co. v. I. S. & Co.

It is contended that chapter fourth of the same title, (Code, § 200,) left the practice of issuing *ne exeat* in full force, and the order in question was made upon that understanding. The chapter is entitled, "Other provisional remedies;" and it enacts, that until the legislature shall otherwise provide, the court may appoint receivers, &c., "and grant the other provisional remedies now existing, according to the present practice, except as otherwise provided in this act."

On full consideration of the point, we are all agreed that this section does not save the process of *ne exeat*. That process was one for the arrest of a party, in a civil action. The 153d section is positive, that no such arrest shall be made, except as *prescribed* by the code. The code does not prescribe a *ne exeat*, and it prescribes the specific cases in which parties may be arrested, not including the case made by this complaint. The reservation of *other* provisional remedies, in § 200, seems to be intended for remedies other than those provided by the code itself; and if that be not the necessary inference, the concluding paragraph, "except as otherwise provided in this act," is a plain declaration, that where the act gives a provisional remedy, and makes it applicable to all cases in which such remedy is permissible, the corresponding existing remedy, according to the practice when the act took effect, is superseded.

The first report of the commissioners on practice and pleadings, (page 161,) shows that it was their intention by the code, to abolish the writ of *ne exeat*, or equitable bail; not at a future time, but manifestly by the bill accompanying their report. We think the act as enacted by the legislature, carried this intention into effect. We find no good reason for supposing that the provisions for arrest and bail, were intended for legal rights and claims, to the exclusion of those which are of an equitable character. They apply to all "civil actions," which term embraces an equity suit between partners, as well as a case of trover and conversion.

The defendant must be discharged, and his undertaking returned to him to be cancelled, on his relinquishing all supposed rights of action growing out of his arrest.

[At Chambers.]

Before Mr. Justice DUER.

THE AMOSKEAG MANUFACTURING COMPANY *against* I. S. AND R.—
12th and 13th July, 1849.

TRADE MARKS—INJUNCTION.

The jurisdiction that courts of equity now exercise in relation to trade marks, is of recent origin. It is, however, firmly established, and upon just and rational grounds.

Every manufacturer, &c., has an unquestionable right to distinguish his goods by a particular

N. Y. Superior Court.—Amoskeag Man. Co. v. I. S. & Co.

mark or device, that they may be known as his in the market, and that he may thus secure the profits that their superior quality may be the means of gaining.

In the exercise of this right, he is entitled to the protection of the law, and the interests of the public as well as of the individual require that this protection should be given to him.

He who affixes to his own goods a copy or imitation of the trade mark of another, commits a fraud upon the public and upon the owner of the original mark.

Purchasers are deceived by having imposed upon them an article they never meant to buy.

The owner is robbed of the fruits of the reputation he had justly earned.

In the case of the owner there is a fraud coupled with damage, and the injury to him may be such as not to admit a compensation in damages. If not restrained it may be irreparable.

The right and duty of a court of equity to restrain the wrong-doer by injunction, therefore, rests upon these grounds:—1. The protection of a party in the exercise of a legal right. 2. The suppression of fraud. 3. The prevention of irreparable mischief.

The power of granting an injunction is, however, to be exercised with great caution. The interests of the public and the rights of individuals, prescribe certain limits that must not be transgressed.

It is not to be exercised where the legal right is disputed and is doubtful, nor so as to create or incur the hazard of creating a monopoly.

The essence of the wrong which is to be restrained and punished, consists, in all cases, in the sale of the goods of one person as those of another.

Hence, it is only when this false representation is directly or indirectly made, and only to the extent in which it is made, that an injunction should be granted.

The owner of the original mark is to be protected in the exclusive use of all such signs, symbols, &c., as indicate the true origin or ownership of the goods, but not of such as only designate their name or quality.

To justify the interference of the court, it is not necessary that the resemblance between trade marks should be entire and perfect. It is sufficient that the intent of misleading the public as to the ownership of the goods is apparent, and this is conclusive when the evidence shows that the public had been in fact misled.

In the application of the principles stated to the facts of the case, it was held that the general resemblance of the trade mark adopted by the defendants to the original trade mark of the plaintiffs, was such as to render it proper and necessary to continue the injunction—the imitation was designed and elaborate. It was calculated to mislead the public, and it was proved that many purchasers had been in fact misled.

But it was also held, that the letters A. C. A. upon the trade mark of the plaintiffs were not an indication of ownership, but were only used to designate the relative quality of the goods, and hence that the defendants could not be restrained from using them for the same purpose.

The injunction was modified accordingly.

An injunction had been granted in this case, restraining the defendants from making or using certain marks, stamps, labels or tickets, which had been used by the plaintiffs for many years to designate the quality of ticking manufactured and sold by them, and which they claimed the exclusive right of using.

The defendants had, for several years, used a label somewhat similar to the plaintiff's, and contended that the plaintiff was not entitled to the exclusive right to use the label in question.

Application was thereupon made by the defendants to vacate or modify the injunction.

The motion was founded on complaint and answer, and was opposed upon numerous affidavits.

The points involved in the discussion sufficiently appear in the opinion.

Daniel Lord, for the defendants.

A. J. Smith and *William Kent*, for the plaintiff.

28th July, 1849. *DUER, J.*—I am satisfied that this injunction

N. Y. Superior Court.—*Amoskeag Man. Co. v. I. S. & Co.*

ought not to be wholly dissolved, and equally so, that upon the case, as it now stands, it cannot be sustained in the full extent to which it has been granted.

I shall first state the general rules that, as I conceive, belong to the subject, and then endeavor to apply those rules to the special facts in this case.

It has been said, that the doctrine of an exclusive property in trade-marks has prevailed from the time of the year books, (2 Keene, 218,) but it is certain that the jurisdiction, in relation to such marks, that courts of equity now exercise, is of recent origin. Originally the party claiming to be the owner of a trade-mark, was left to establish his right and seek his remedy in a court of law. Lord Hardwicke refused an injunction in a case in which, at the present day, one would certainly be granted, and he accompanied the refusal with the remarks, that "he knew of no instance of granting an injunction to restrain one trader from using the trade-mark of another, and that, in his opinion, it would be of mischievous consequence to do so." (*Blanchard v. Hill*, 2 Atk. 284.) The apprehension of mischievous consequences that this eminent judge felt and expressed, experience has shown to be groundless, and the doctrine which he rejected is now established, and established, as all admit, upon just and rational grounds.

Every manufacturer, and every merchant for whom goods are manufactured, has an unquestionable right to distinguish the goods that he manufactures or sells by a peculiar mark or device, in order that they may be known as his in the market for which he intends them, and that he may thus secure the profits that their superior repute as his may be the means of gaining. His trade-mark is an assurance to the public of the quality of his goods, and a pledge of his own integrity in their manufacture and sale. To protect him, therefore, in the exclusive use of the mark that he appropriates, is not only the evident duty of a court as an act of justice, but the interests of the public, as well as of individuals, require that the necessary protection shall be given. It is a mistake to suppose that this necessary protection can operate as an injurious restraint upon the freedom of trade. Its direct tendency is to produce and encourage a competition by which the interests of the public are sure to be promoted; a competition that stimulates effort and leads to excellence from the certainty of an adequate reward. When we consider the nature of the wrong that is committed when the right of property in a trade-mark is invaded, the necessity for the interposition of a court of equity becomes still more apparent. He who affixes to his own goods an imitation of an original trade-mark, by which those of another are distinguished and known, seeks, by deceiving the public, to divert and appropriate to his own use the profits to which the superior skill and enterprise of the other had given him a prior and exclusive title. He *endeavors* by a false representation to effect a dishonest purpose; he commits a fraud upon the public, and upon the true owner of the trade mark. The purchaser has imposed upon him an article that

he never meant to buy, and the owner is robbed of the fruits of the reputation that he had successfully labored to earn. In his case there is a fraud coupled with damage, and a court of equity in refusing to restrain the wrong-doer by an injunction would violate the principles upon which a large portion of its jurisdiction is founded, and abjure the exercise of its most important functions—the suppression of fraud and the prevention of a mischief that otherwise may prove to be irreparable.

The principles that have now been stated as the foundation of the jurisdiction of the court, are clearly expressed or necessarily implied in nearly all the decisions, and I refer especially to the language of the judges in *Blofield v. Payne*, 4 B. R. Art. 410, and in *Crawshay v. Thompson*, 4 Man. & Gr. 357; and to the lucid opinions of the master of the rolls in *Knott v. Cologan*, 2 Keene, 213; and in *Croft v. Day*, 7 Beavan, 84). It is not, however, to be denied that the power of granting an injunction to restrain an unauthorized use of trade-marks ought to be exercised with great caution, so as not to transgress the limits that a just regard to the rights of individuals and the interests of the public must be admitted to prescribe. It is not to be exercised where the legal right is disputed and is doubtful; it is not to be exercised so as to involve a violation of the principles upon which it is founded; it is not to be exercised so as to create a monopoly unjust to other manufacturers, and, of necessity, prejudicial to the public. The owner of an original trade-mark has an undoubted right to be protected in the exclusive use of all the marks, forms, or symbols that were appropriated as designating the true origin or ownership of the article or fabric to which they are affixed, but he has no right to an exclusive use of any words, letters, figures or symbols, which have no relation to the origin or ownership of the goods, but are only meant to indicate their name or quality. He has no right to appropriate a sign or symbol which, from the nature of the fact which it is used to signify, others may employ with equal truth, and therefore have an equal right to employ, for the same purpose. Were such an appropriation to be sanctioned by an injunction, the action of a court of equity would be as injurious to the public as it is now beneficial; it would have the effect in many instances of creating a monopoly in the sale of particular goods as exclusive as if secured by a patent, and freed from any limitation of time. The importance of the distinction that I have endeavored to explain in its application to the present case will hereafter appear. At present, it is sufficient to say, that in all cases where a trade mark is imitated, the essence of the wrong consists in the sale of the goods of one manufacturer or vendor, as those of another, and it is only when this false representation is directly or indirectly made, and only to the extent in which it is made, that the party who appeals to the justice of the court can have a title to relief.

It is evident, however, that in order to convey a false impression to the mind of the public as to the true origin or manufacture of

goods it is not necessary that the imitation of an original trade-mark shall be exact or perfect. It may be limited and partial. It may embrace variations that a comparison with the original would instantly disclose, yet a resemblance may still exist that was designed to mislead the public, and the effect intended may have been produced; nor can it be doubted that whenever this design is apparent, and this effect has followed, an injunction may rightfully be issued, and ought to be issued.

To select a case of a very partial imitation. No person can be justified in affixing to his own goods, whether by stamp, label, or otherwise, the name or style of another person, firm, or company, known to be the manufacturers of similar goods, although all other particulars contained in the real trade-mark of those manufacturers; may be wholly omitted. Such a use of the names or style of other manufacturers, is, generally speaking, conclusive evidence of a fraudulent intent; but even where no fraud can be justly imputed, where the use of the name or style originated in mistake, and not in design, although the party may be exempted from damages and costs, the continuance of the use may be justly restrained, since it involves a violation of a right of property, that if persisted in with a knowledge of the fact, would be fraudulent. In *Millington v. Fox*, 3 Mylne & Craig, 338, the defendants had stamped upon the steel which they sold, the words "Crawley, or Crawley Millington," not knowing or believing that these were the names of other manufacturers, and were stamped by them upon steel of their own manufacture, but supposing that the words were descriptive of the particular kind or quality of the steel. Their mistake, however, was rendered apparent by the evidence, and upon this ground Lord Cottingham, while he wholly acquitted them of any fraudulent design, decreed a perpetual injunction. Such, I conceive, is the true explanation of a decision, the authority of which the learned counsel for the defendants strenuously denied, while on the other hand it was urged by the counsel for the plaintiffs as supporting a doctrine much broader than it appears to warrant.

Nor is it by any means necessary, in order to render the imitation of a trade-mark culpable and justify the interference of the court, that it shall contain any forgery, (for as such, the act when intentional, deserves to be branded,) of the name of the owner of the original mark, or of the person from whom he derived his title. In addition to the name of the proprietor, the original mark may exhibit some peculiar device, vignette or symbol, stamped, printed or engraved, which he had a perfect right to appropriate, and which, as well as the name, was intended as a declaration to the public of his right of property, and was adopted as an additional security against its invasion. In an imitation of the original mark upon an article or goods of the same description, the name of the proprietor may be omitted, another name, that of the imitator himself may be substituted, but if the peculiar device is copied, and so copied as to manifest a design of misleading the public, the omission or variation ought

to be wholly disregarded. Its object, we may be certain, was not to communicate the truth, but to escape the penalty of falsehood; a fraud is intended, an unlawful gain is meant to be realized, but it is believed or hoped that an injunction may be avoided and a claim for profits or damages be repelled. The fraud, however, if a court of equity is true to its principles, will be suppressed and its fruits be intercepted or restored. My conclusions on this branch of the subject are, that an injunction ought to be granted whenever the design of a person who imitates a trade-mark, his design apparent or proved, is to impose his own goods upon the public as those of the owner of the mark, and the imitation is such that the success of the design is a probable or even possible consequence, and that an injunction must be granted whenever the public is in fact misled, whether intentionally or otherwise, by the imitation or adoption of marks, forms or symbols which the party who first employed them had a right to appropriate, and this for the plain reason that when a right of property has been thus acquired, it must be protected.

It must not, however, be inferred from these remarks, that an injunction ought to be granted whenever there exists such a resemblance between trade-marks as may induce a belief in the mind of the public that they belong to, and designate the goods of, the same trader or manufacturer. It is not enough that the public may be misled, or has been misled. As already intimated, the resemblance must arise from the imitation or adoption of those words, marks or signs which the person who first employed them had a right to appropriate as indicating the true origin or ownership of the article or fabric to which they are attached, and the resemblance, where it induces error and gives a title to relief, must amount to a false representation express or implied, designed or accidental, of the same fact. A trade-mark is frequently designed to convey information as to several distinct and independent facts, and therefore contains separate words, marks or signs, applicable to each, thus indicating not only the origin or ownership of the article or fabric to which it is attached, but its appropriate name, the mode or process of its manufacture, and its *peculiar* or relative quality. It is certain, however, that the use by another manufacturer of the words or signs indicative only of these circumstances may yet have the effect of misleading the public as to the true origin of the goods, but it would be unreasonable to suppose that he is therefore precluded from using them as an expression of the facts which they really signify, and which may be just as true in relation to his goods as to those of another. Purchasers may be deceived; they may buy the goods of one person as those of another, but they are not deceived by a false representation; they are deceived because certain words or signs suggest a meaning to their minds which they do not in reality bear and were not designed to convey. We may draw an illustration from the present case. The goods of the defendants, to which their trade-mark is attached, are certainly "tickings," they are woven by a power-loom, and they are the first quality of the tickings which they manufacture or sell. Hence they

have a perfect right to print or stamp upon their label the words "Tickings," "Power-Loom" and "First Quality," or "Superfine," nor can I believe that their right to do so would in the slightest degree be impaired or affected, were it proved that the plaintiffs had previously, and for a long series of years, used the same words in their own trade-mark upon similar goods, and had founded upon such use a claim of exclusive property. Nor would the case, in my judgment, be altered, should it appear that owing to these circumstances the plaintiffs' tickings had become generally known in the market, as "Power-Loom Tickings," or "Superfine Tickings," so as to induce a general belief that all tickings upon which these words were labelled, were in reality their manufacture. This error, however general, could never confer the right of property which it supposes to exist. The counsel for the defendants strenuously insisted that names cannot be appropriated, that a just title to their exclusive use can never be acquired, and he doubtless referred to those names, general or specific, of things, modes or qualities which form a part of our common language, and which all of us therefore, have a right to employ when we wish to *communicate* the facts they are used to signify, and thus explained, the proposition, so far from being at all doubtful, is a certain, and in its application to cases like the present, a luminous and a guiding truth.

The positions that have been thus stated and illustrated, appear to me so evidently true, as not to require any support from authority, but the authorities are, in fact, numerous and decisive, and to a few of the cases I shall now refer.

The earliest case is *Singleton v. Bolton*, 3 Doug. 293. The plaintiff's father, and after his death the plaintiff, had been, for a long time, in the practice of selling a particular medicine, under the name of "Dr. Johnson's Yellow Ointment;" the defendant had commenced selling the same ointment under the same name, and for this supposed invasion of his exclusive right, the plaintiff brought his action. Although these facts were proved upon the trial, the plaintiff was nonsuited and the non-suit was confirmed by the court of king's bench. Lord Mansfield, in giving the opinion of the court, said, that it was not pretended that the plaintiff had any *exclusive* right in the *medicine itself*, and the defendant had, therefore, an equal right to prepare and sell it under the same name that the plaintiff used, there being no evidence to show that he sold it as if prepared by the plaintiff—in other words, there being no false representation. In this case, the words "Doctor Johnson" were the name of the inventor of the medicine, but by long use they had become a part of the proper name of the medicine itself, which name all persons had, consequently, an equal right to employ. The case of *Canham v. Jones*, 2 Ves. & Beames, 218, was decided by the vice-chancellor, (Sir Thomas Plumer,) upon the same principle. The bill was filed to restrain the defendant from preparing and selling a medicine called "Velno's Vegetable Syrup," and it asserted that the plaintiff had acquired an exclusive right in the medicine itself, and in the use of the name by which it was gene-

rally known. To this bill there was a general demurrer, and upon the argument the plaintiff's counsel did not attempt to maintain his case upon the ground that he could justly claim an exclusive right in the medicine, but they insisted that he had acquired the right, by a prior occupation, of using exclusively the particular name by which the medicine was called, and that the defendant was guilty of a fraudulent invasion of this right, in selling the composition prepared by himself, by the same name. The vice-chancellor was, however, of opinion that, as the plaintiff had no exclusive right in the medicine, it was a necessary consequence that he could have none in the use of its name, and therefore allowed the demurrer.

Perry v. Truffit, 6 Beavan, 66, the plaintiff was the original vendor of a medicine which he labelled as "Perry's Medicated Mexican Balm." The defendant afterwards prepared and sold the same or a similar medicine, which he labelled as "Truffit's Medicated Mexican Balm." The bill was in the usual form for an injunction and an account. An injunction was denied, but although the master of the rolls, when he refused it, retained the bill for the purpose of enabling the plaintiff to establish his right by an action at law, he was evidently of opinion that his legal right could never be established. His opinion evidently was, that as the words "Medicated Mexican Balm" might be just as true a description of the medicine of the defendant as of that of the plaintiff, the former had an equal right to use them. This opinion seems to cover the whole ground. "Balm" was the general, "Mexican Balm" the specific name of the medicine, and the word "Medicated" indicated its quality and the mode of its preparation. No action at law was brought by the plaintiff, plainly from the conviction of his counsel that he could not succeed, and the bill was finally dismissed, with costs.

In *Millington v. Fox*, had the defendants been right in their supposition that the words "Crawley" and "Crawley Millington," were descriptive only of the kind or quality of the steel upon which they were stamped, it is manifest, both from the arguments and admissions of the counsel, and the reasoning of the chancellor, that a perpetual injunction would not have been decreed.

I shall now proceed to apply the observations that have been made to the facts in this case. When I compare the original trade-mark of the plaintiffs with that set forth in the complaint, of which the defendants have now relinquished the use, I find it impossible to doubt that the latter is a designed, elaborate imitation of the former. They are the same in form, size and color; it is only by a very close inspection that the ornamented border can be at all distinguished. In the centre of each we find the same words and letters in the same relative positions. "Power Loom"; yds.; A. C. A.; and the only differences are, that at the top, immediately under the vignette, the words "Lowell Premium Tickings," are substituted, in the label of the defendants, for the words "Amoskeag Manufacturing Company," in that of the plaintiffs, and at the bottom, the words "Warranted Indigo Blue," for "Amoskeag Falls, N. H.," variations scarcely im-

pairing, far less sufficient to destroy, a general resemblance that was calculated to deceive the public, and by which, the evidence is abundant and conclusive to show that many dealers have been, in fact, deceived. Under these circumstances I cannot attach any importance to the denial by the defendants in their answer, of any intention to injure or defraud the plaintiffs. They acted with a design, and it would be absurd to suppose that this design had no further object than the mere imitation of the trade-mark which they copied. In attaching their simulated label to tickings resembling in appearance and quality those of the plaintiffs, they undoubtedly meant to gain an advantage in the sale; they meant to secure to their goods a preference in the market that they would not otherwise have commanded; nor can I understand how this advantage could be gained, unless their tickings were to be sold and purchased as those of the plaintiffs. Had they only wished to secure a preference to their goods, *as their own*, an imitation of the trade-mark of the manufacturers was worse than useless. It had a direct tendency to defeat that object, and, it is manifest, that had such been their object, no such imitation would have been attempted or thought of. It would not have been attempted or thought of, but from the hope of gains it was to be the means and instrument of realizing. I cannot, therefore, escape from the conviction, that the real motive of the defendants was an expectation of the benefits to result to themselves from the error of purchasers, and from the imposition upon purchasers that subordinate dealers would be tempted and enabled to practise; and I assent entirely to the observations of the vice-chancellor, in *Coates v. Holbrook*, 2 Sandford's Ch. R., that even where no false representation is directly made, the imitation of a trade-mark, prompted by such motives, is, in judgment of law, a fraud, the profits of which must be accounted for, and the continuance of which a court of equity is bound to inhibit.

It is said, however, and was strongly pressed upon the argument, that the defendants had provided an effectual security against the imposition of dealers, and the mistakes of purchasers, by substituting upon their label the words "Lowell Premium Tickings," in place of "Amoskeag Manufacturing Company," in that of the plaintiffs; but I cannot think so. I cannot think that this security is provided, or was meant to be provided, for not only may the substituted words, as is proved to have been the case, from their position, wholly escape the attention of purchasers, but when read, they may not have the effect of altering the belief that the general resemblance of the labels is calculated to produce. The words are exceedingly ambiguous—they are not a declaration that the tickings are not manufactured by the plaintiffs, but are entirely consistent with the supposition that they are. As the label upon which they are found is, in other respects, that of the plaintiffs, they may well be construed as an assertion that tickings belonging to the plaintiffs, corresponding in quality with those to which the label is attached, had gained, at Lowell, the premium to which the words refer; nor is it at all improbable that many purchasers have thus understood them, and have believed that

N. Y. Superior Court.—Amoskeag Man. Co. v. I. S. & R.

the very fact that such a premium had been gained, was the cause of an alteration in the label. If the defendants were personally asked, whether the tickings which they sell are the manufacture of the plaintiffs, it would be an equivocation to reply, abstaining from a positive negative, "They are Lowell Premium Tickings." And it is this equivocation which they stamp upon their label, and which they utter to all who purchase the tickings to which that label is attached. I do not pretend to know the exact meaning of the words "Lowell Premium Tickings," nor have the defendants or their counsel attempted to explain them. Their apparent meaning, that which at once strikes the mind, is, that tickings of the same fabric as those which the words are used to designate, in a competition at Lowell, had gained a premium, as the best quality of American tickings; and if this assertion is untrue, whether injurious or not to the plaintiffs, it is a fraud upon the public. It is possible that the defendants may attach a different meaning to the words, and that the meaning which they attach to them may be true, but if so, as the words are equivocal and are calculated to deceive the public, their use, until their true meaning is explained, ought to be discontinued, and, I hope, will be discontinued.

Were it in my power, however, to view the conduct of the defendants in a more favorable light than I am now able to do, could I wholly acquit them of any fraudulent intent, it still remains true that they have imitated and adopted those parts of an original trade-mark which the plaintiffs had a right to appropriate for the purpose of securing their own title as manufacturers, and that the public has been misled by the resemblance in the labels thus produced, and I have already stated that the concurrence of these facts is alone sufficient to render it the duty of the court to interfere by an injunction.

The allegation that there has been such an acquiescence for some years on the part of the plaintiffs in the conduct of the defendants, as to bar the former from the relief they now seek, I cannot regard; not only is the allegation sufficiently disproved, but I am satisfied that the doctrine of acquiescence operating as an absolute surrender of an exclusive right, is inapplicable to the case. The consent of a manufacturer to the use or imitation of his trade-mark by another, may, perhaps, be justly inferred from his knowledge and silence; but such a consent, whether expressed or implied, when purely gratuitous, may certainly be withdrawn, and when implied, it lasts no longer than the silence from which it springs; it is in reality no more than a revocable license. The existence of the fact may be a very proper subject of inquiry in taking an account of profits, if such an account shall hereafter be decreed; but even the admission of the fact would furnish no reason for refusing an injunction.

As a necessary consequence of what has been said, I must retain all that part of the injunction which precedes the words "or having thereon the letters 'A. C. A.' " to which I add the words "or being a colorable imitation thereof." I borrow these last words from the form of the injunction which was granted and framed by the master of the rolls

N. Y. Superior Court.—Amoskeag Man. Co. v. I. S. & R.

in *Knott v. Morgan*, and which he afterwards followed in *Croft v. Day*, and I adopt them in the sense in which he doubtless employed them, as denoting such an imitation as is designed and calculated to mislead the public as to the true origin or ownership of the article or fabric to which it is attached.

I pass now to the question which the parties evidently consider as practically the most important, namely, whether the residue of the injunction shall be stricken out or retained? The injunction, as it now stands, prohibits the defendants from using any stamp, mark, or label, for or upon any tickings having thereon the letters "A. C. A.," and the propriety of continuing this prohibition in force, depends upon the fact whether the plaintiffs have shown an exclusive title to the use of these letters upon their own tickings as declaratory of their right of property as manufacturers. If they have, the prohibition must be retained, but if the letters "A. C. A.," as used by them, are merely an indication of the relative quality of their tickings, it must be expunged. As the plaintiffs could not have acquired by their prior occupation an exclusive right in the use of the words "First Quality," or "Superfine," they cannot have acquired a right by similar means to an exclusive use of any letters, marks, or other signs, which are merely a substitute for the words, and intended to convey the same meaning. It is immaterial whether words, or letters, or figures, or any other signs, are used, if the single fact which they are used to indicate or declare, is a truth that other manufacturers or dealers have an equal right to express and communicate.

The complaint avers that the letters "A. C. A." signify as follows; "A. C." Amoskeag Company, and "A." best quality—and several of the witnesses, whose affidavits are produced, swear that the letters are so understood by them, and as they believe, are so generally understood. On the other hand, these allegations are explicitly denied by the defendants, who aver in their answer that it is the universal practice of manufacturers to distinguish the various qualities of their goods by one or more letters of the alphabet—and that the letters "A. C. A." in the label of the plaintiffs, are only used and intended to be understood as a declaration to the public, that the tickings to which the label is attached, are the best quality of those which they manufacture; such are not the exact words, but such is the substance of the averments in the answer, and the conclusion to which my reflections have led me, is that these averments in their declaration are true. It was doubtless of importance to the plaintiffs to make known to the public by a declaration in their label, that they are the manufacturers of the excellent tickings which they send into the market, and for this reason the name of their corporation, "Amoskeag Manufacturing Company" appears in full upon their label. The purchasers of the tickings either read these words or they do not; if they do, the letters "A. C. A." even if they understand them as indicating the name of the company, give them no additional information; if they do not, the meaning of the letters, if such is their meaning, will not be understood. To the first the letters thus interpreted are useless, and to the second

N. Y. Superior Court.—Ameskeag Man. Co. v. I. S. & R.

unintelligible ; it is a self-evident truth, that initial letters can never communicate the knowledge of a name to those who were previously ignorant of it. The only purpose they can answer is that of recalling a name already known. Nor is this all, the letters "A. C." considered as initials, would not probably have the effect even of recalling the name which they are said to signify ; to answer this purpose it is plainly necessary that the initial letter of each word, comprising the name, whether of an individual or of a corporation, should be given, and this, where initials are used as the substitute for a name, is the universal practice. Here the letter "M" is omitted, yet the word "Manufacturing" is an essential part of the corporate name ; it is therefore highly improbable that the letters "A. C." were used by the plaintiffs in a sense in which it was most unlikely that others would understand them. They probably adopted these letters because they were partly the initials of their corporate name, but it is not, I am persuaded, for the purpose of signifying that name, and thus indicating their ownership that they employ them ; their value and meaning is wholly different—the final letter "A" we are told, is alone used to designate the quality of the tickings ; it alone signifies that they are the best quality of those which the plaintiffs manufacture, but if this were true the letters "A. C." might be erased, and the final "A." as a designation of that quality, would alone be sufficient. It is however admitted that such is not the fact. Another label which the plaintiffs attach to their tickings was produced upon the hearing, resembling in all respects that set forth in the complaint, except that the single letter "A." is found in the same place as the three letters "A. C. A." and it was admitted that this label is only attached to tickings of the second quality—while that containing the three letters is reserved and is used exclusively for those of the best. The conclusion is not to be resisted ; it is to designate the best quality of tickings that the three letters are used, it is this purpose which they answer, and none other. The plaintiffs aver in their complaint that they have invented a stamp or label, the same which they set forth "by which to designate the best quality of their tickings," but how have they effected this object ? Strike from their label the letters "A. C." there is no such designation ; restore them, it is found. As the use of the three letters conjointly is therefore necessary to express the meaning which the plaintiffs admit that they intended to convey, I am forced to believe that it was for this purpose that they were first adopted, and are alone employed. It is doubtless true, as is stated in the complaint, and sworn in many of the affidavits, that the tickings of the plaintiffs, to which their A. C. A. label is attached, have for many years been known in the market as the "A. C. A. Tickings," but this fact neither alters the meaning of the letters, nor takes from others the right to employ them. If the letters designate only the quality of the goods and not their origin or ownership, the tickings of the defendants, if the best quality of those which they sell, are as truly "A. C. A. Tickings" as those of the plaintiffs. The words "Power Loom" are found upon the label of the plaintiffs, yet as it is not contended that I could re-

N. Y. Superior Court.—Amoskeag Man. Co. v. I. S. & R.

strain the defendant from using the same words as they have done upon their own. If there exists a distinction I am unable to perceive it. The claim of an exclusive rights rest in both cases upon the same grounds ; it is valid in both, or in neither.

Were my opinion upon this question less clear and decided than it actually is, I should still be unable to retain the injunction in its present form. The rule is fully settled and is recognized in nearly all the cases that in suits of this nature an injunction is never to be granted in the first instance, if the exclusive title of the plaintiff is denied, unless the grounds upon which it is denied are manifestly frivolous. When the title is disputed the course is to let the motion for an injunction stand over until the plaintiff has established his legal right in an action at law. The obligation of following this general rule, was distinctly admitted by our late chancellor, in *Partridge v. Meach*, 5 New-York Legal Observer, 94 ; S. C. Barber's Ch. R. 101 ; and in *Molloy v. Downman*, 3 Mylne & Craig, 14, where the rule was followed, Lord Cottingham uses the strong expressions that "he cannot conceive a case in which the court will interfere at once by an injunction so as to prevent the defendant from disputing the plaintiff's legal title." The legal title of the plaintiffs in the present case to the exclusive use of these significant letters A. C. A., is denied, and certainly not upon frivolous grounds, since I have not understood the counsel for the plaintiffs to deny, that if the averments in the answer shall be sustained by proof, the title as claimed cannot be supported. By our present practice, I cannot direct an action at law to enable the plaintiffs to establish their right, for if I rightly understand the provisions of the Code, the present suit is such an action, and in reality every complaint, whatever the nature of the facts set forth, or the relief that is sought, is at once a declaration at law, and a bill in equity. I can give to the defendants, however the benefit of the general rule by so modifying the injunction as not to restrain them from using the letters A. C. A., until the legal right of the plaintiff shall have been established by the verdict of a jury in this suit, and I am satisfied that it is this course that I should be bound to follow even were my opinion as to their legal right widely different from that which I have expressed. The injunction must therefore be modified by striking out all that part of it which commences with the words "or having thereon," and ends with the words "ticket or otherwise." No costs are given to either party, and I presume none are desired.

I ought not to close this opinion without expressing my thanks to the counsel of the parties for the singular ability, learning, and candor with which they conducted the argument. The task of a judge, when thus assisted, is comparatively light and his errors hardly to be excused.

The following is a copy of the injunction, as modified in accordance with the opinion :

It appearing satisfactorily to me, by the affidavits of Charles Mer-

VOL. VII.

N. Y. Superior Court.—*Blossom v. Adams.*

riam and Cornelius Ives, and by the complaint in this action, verified by affidavit of William Amory, treasurer of the plaintiffs, that sufficient grounds therefor exist, and an undertaking pursuant to the statute having been filed; I do hereby order, that the defendants, Calvin Flint Spear and George B. Ripley, and each of them, and their attorneys and agents, refrain from making, devising, or causing to be made or devised, purchasing or procuring, any marks, stamps, labels, or tickets, described in the said complaint in this action, as in use by the defendants upon tickings possessed and sold by them, and from using the said marks, stamps, labels, or tickets, upon any tickings whatever in their possession or under their control, or offered or kept for sale by them, or on their account, or for their benefit, and from selling, keeping, or offering for sale, any tickings having thereon any such stamp, mark, label, or ticket, and from making, devising, or causing to be made, or devised, purchasing, or procuring or in any way or manner using for or upon any tickings whatever, any stamp, mark, label, or ticket, similar to the stamp, mark, label, or ticket of the plaintiffs, mentioned and described in said complaint, or being a colorable imitation thereof, until the further order of this court; and in case of disobedience to this order, you will be liable to the punishment therefor prescribed by law.

JNO. DUER.

Dated July 2d, 1849.

[*Special Term, August 28th, 1849.*]

Before Mr. Justice MASON.

BLOSSOM against ADAMS.

The jurisdiction of the Superior Court does not extend beyond the limits of the city and county of New-York. A plaintiff, therefore, residing in Brooklyn, in the county of Kings, is a non-resident and must give security for costs.

THE plaintiff resides in Brooklyn, and the defendant moves that he give security for costs.

T. Sayre, for defendant.

R. W. Townsend, for plaintiff.

MASON, J.—Within the meaning of the statute requiring a non-resident plaintiff to file security for costs, the jurisdiction of this court does not extend beyond the city and county of New-York, and that statute has not been repealed or altered by the Code.

Motion granted.

N. Y. Common Pleas.

Before Mr. Justice INGRAHAM.

[September Special Term.]

ISRAEL S. TUCKER v. WILLIAM L. RUSHTON.—21st Sept., 1849.

CODE—PLEADING—COMPLAINT—DEMURRER.

The old rules of pleading are abrogated by the Code, and cannot, therefore, be applied to it. If the complaint or answer contain such a statement of facts as make out a case, it is enough, though it be informally done.

Where, therefore, a complaint begins by alleging indebtedness, and also alleges that the plaintiff claims a sum certain for use and occupation of certain rooms, furniture, &c., for a specified time, at a specified price, and also for articles furnished by plaintiff to defendant: Held, that sufficient appears to bring it within the rule which requires plaintiff to state all that is necessary to make out his case.

THE complaint alleged that the defendant was indebted unto the plaintiff in the sum of one hundred and fifty-five dollars and seventy-six cents, for the use and occupation of certain rooms, furniture, &c., of the plaintiffs, and at the request of the defendant, and for meat, drink, fire, candles, attendance, &c., by the plaintiff provided for the defendant, and at his request, from the first day of April, 1849, to the first day of May, 1849, both inclusive; that the items of his account were as follows:—

1849.	April 1.	To one month's board at the Broadway Hotel, from the 1st day of April, 1849, to the 1st day of May, 1849, both days inclusive, as per agreement,	\$150 00
"	"	2. To one extra dinner,	38
"	"	5. To lunch sent to room,	25
"	"	10. To cash paid for lamp glass,	17
"	"	12. To brandy,	6
"	"	13. To lunch sent to room,	25
"	"	16. To extra tea,	38
"	"	18. To cash paid for bringing trunks to Broadway Hotel,	28
			\$151 76

To this complaint the defendant demurred, and set out *five* causes of demurrer. The principal causes of demurrer relied on by the defendant's counsel, were the *third*, *fourth*, and *fifth* ones. The first of which was, that the complaint did not state facts sufficient to constitute a cause of action. Fourth, that the complaint did not allege that the defendant ever promised to pay the amount claimed for the goods; and fifth, that the complaint did not state that the goods were worth the value claimed for them.

Ellis, Burrill and Davison, in support of demurrer.

R. M. Harrington, contra.

INGRAHAM, J.—Although it would be better if counsel would draw their pleadings with more care, we do not feel warranted in applying the old rules of pleading to complaints and answers under the Code. We consider these rules generally abrogated by the introduction of a system which only requires a simple statement of the facts on which the plaintiff-relies in his complaint, or the defendant in his answer. It is enough if the plaintiff states the facts necessary to make out his case, even if informally done. In this case, the complaint begins by alleging indebtedness, which would be better at the end than the beginning, but he also alleges that he claims a certain sum for the use of rooms by defendant for a specified time, at a specified price, and for other articles furnished by him at a specified price, and for other articles furnished by him to the defendant at his request. There can be no difficulty in understanding what this means, and it is within the rule that requires the plaintiff to state all that is necessary to make out his case. To attempt the application of the old rules of pleading to the present system would be idle, and lead to endless prolixity.

We have heretofore held such a complaint sufficient. I see no reason for altering that rule in the present case.

Defendant allowed to amend on payment of \$15 costs.

CATHERINE FINNERTY *against* WILLIAM I. BARKER.

SLANDER—DEMURRER TO COMPLAINT—WANT OF STATEMENT IN COMPLAINT OF WORDS USED—UNCERTAINTY OF CHARGE OF CRIME IMPUTED.

The rule which requires a statement of the cause of action, renders it necessary, in a suit for slander, to set forth the precise words used.

Where, therefore, a complaint alleged that the defendant charged the plaintiff that she had been guilty of *stealing, or some other misdemeanor*:—Held, that it was demurrable for want of a sufficient statement of facts to constitute a cause of action. The plaintiff should have stated distinctly what the charge was, so that the defendant might have known what he was sued for.

A defendant cannot justify under sections 163 and 164 of the Code, unless the slander is set forth in the complaint.

The omission to state the time or place of the slander, is not a ground of demurrer; the court can order the pleading to be made definite by amendment.

A complaint need not be positive, it may be on information. § 167.

THE complaint states that, as she is informed and believes, some time in the month of January, 1849, William I. Barker, falsely, &c., made a certain charge against said plaintiff, in the police-office of this city, wherein he charged and alleged of and concerning the plaintiff, that she had been guilty of *stealing, or of some other gross misdemeanor or*

felony, by reason of which charge the plaintiff was arrested and confined for one week, or more, in the prison called the Tombs.

The complaint further states, that afterwards, whilst plaintiff was engaged in her trade of a hair-worker for one Christadora, the defendant falsely and maliciously, and with intent to injure the character and ruin said plaintiff, said to said Christadora, of and concerning the plaintiff, that he came to let him know what he knew about her (meaning the plaintiff,) that *she was a poor worker, and he thought she had taken some things from his store*, and also used other words and language of and concerning the plaintiff to the effect that she, the plaintiff, had *stolen goods from him, the said defendant*.

The complaint further states, that the plaintiff further alleges and believes, that in the month of March, or April, 1849, an acquaintance of her, the said plaintiff, named Smith, called at the store of the defendant and inquired for her. That defendant then said to Smith, that the plaintiff had left his employment, that he suspected her of stealing, and had had her arrested, and that she had been confined in the Tombs; and also referred the said Smith to a newspaper report giving an account of the arrest of the said plaintiff upon the charge of stealing.

The complaint further states, that plaintiff *has been informed and believes*, that the defendant has at divers times spoken scandalously of her, the said plaintiff, and has maliciously sought to ruin and defame her character, by saying of her that she had stolen.

Averment that by reason, &c., the plaintiff had lost, in a great measure, her reputation as a worker at her trade, and her character as an honest person has been assailed and greatly injured. Wherefore, &c.

The defendant demurred to the complaint, on the ground that it does not state facts sufficient to constitute a cause of action, and assigned the following causes of demurrer:

I. that the complaint does not state what was the nature of the charge made against the plaintiff, in the police-office, with sufficient certainty, and is on the mere information and belief of the plaintiff. No slander appears on the face of the complaint to have been uttered by the defendant at the time of making the charge against the plaintiff, nor is it alleged in the complaint that such charge was false.

The complaint does not show that such charge was dismissed, discontinued, or determined, or in what way the plaintiff was discharged therefrom.

II. The complaint does not show that the defendant uttered, published or spoke any slanderous words or matter, of or concerning the plaintiff, to the person called Christadora, in said complaint. It does not set forth what was the language used by the defendant against the character of the plaintiff, to said Christadora. That part of the complaint relating to the conversation of the defendant with Christadora, does not state words sufficient to constitute a slander or cause of action against the defendant. It does not state that said Christadora credited, or was influenced by the statement of the defendant, nor does it show that the plaintiff sustained any injury or damage

N. Y. Court of Common Pleas.—Finerty v. Barker.

thereby. The complaint does not state the time or place when the alleged communication was made by the defendant to said Christadora. It is not direct and positive.

III. The complaint does not allege that the defendant falsely accused the plaintiff in the presence of Smith, with having committed any definite offence. What the defendant told Smith is not set forth with sufficient certainty, and is only an allegation made on mere belief as to the plaintiff. That part of the complaint relating to the conversation with Smith, does not state a fact sufficient of itself to constitute a slander.

The complaint does not show that the report in the newspaper was printed or published by the defendant, nor does it set forth the matter of the charge contained in said newspaper, nor does it state that such charge was false, or that the complaint was dismissed, discontinued, or determined, or in what way the plaintiff was discharged therefrom. It does not show in what way the matter published in said newspaper referred to the plaintiff, nor does it state the name of the said newspaper, nor when and where and by whom the same was printed or published.

IV. That part of the complaint which alleges that the defendant has at divers times spoken scandalously of the plaintiff, and has maliciously sought to ruin and defame the character of the plaintiff, by saying that the plaintiff had stolen, is insufficient and uncertain, and is on the mere information and belief of the plaintiff. It does not state to whom the same was spoken, or that it was spoken or published in the presence or hearing of any person or persons, nor does it give the time or place.

V. The case, as stated in the complaint, will not admit of the conclusion or averment therein contained.

Lastly—The complaint is not sufficiently definite or certain for the defendant to make answer thereto, and does not contain the requisites essential in law for the plaintiff to maintain an action against the defendant.

George Judah, in support of the demurrer.

Charles Sweeney, contra.

INGRAHAM, J.—I do not think the Code intended, in actions for slander, to dispense with the statement of the words used. No such provision is contained in the Code, but the rule which requires a statement of the facts constituting the cause of action renders it necessary. Here the plaintiff alleges that the defendant charged the plaintiff that she had been guilty of stealing, or some other misdemeanor or felony. It would be wrong to require the defendant to answer so uncertain a charge. While he might come prepared to justify a charge of stealing, the plaintiff might, on the trial, set up the charge of murder, under such a complaint. Such a course never could have been intended. The plaintiff must state distinctly what the charge was, so that

N. Y. Court of Common Pleas.—*Hunter v. Frisbee.*

the defendant may know what he is sued for. It would be impossible for the defendant to justify under the 163d and 164th sections, unless the slander is set forth in the complaint.

2. The omission to state the time or place of the slander, is not a ground of demurrer. If necessary, the court can order the pleading to be made definite by amendment. This is to be done on motion. Sec. 160.

3. It is not necessary that a complaint should be positive, but may be on information. In actions for slander a plaintiff rarely, if ever, hears the speaking of the words, so as to be able to swear on his own knowledge. The 167th section provides for this by requiring the plaintiff to swear positively to his complaint, except where he alleges the same to be on information, and then to swear that he believes it true.

I think, however, the complaint is bad in the statement of the first cause of action on the first ground. The plaintiff in amending can remedy the other objections taken, if he thinks proper.

Judgment for defendant on demurrer.

**CHARLES E. HUNTER, SURVIVOR OF LUTHER HUNTER, DECEASED,
against MYRON I. FRISBEE.**

DEMURRER TO COMPLAINT—INSUFFICIENCY OF.

It is not sufficient in a demurrer to a complaint to say that the complaint does not show a good cause of action. The statement of the ground of demurrer should distinctly appear.

COMPLAINT for rent.

Defendant put in a general demurrer, stating that the complaint did not state facts sufficient to constitute a cause of action.

Plaintiff moved to strike out the demurrer, on the ground that it should state wherein the complaint was defective.

J. F. Malcolm, for plaintiff.

Charles Mulock, for defendant.

INGRAHAM, J.—We have heretofore decided that it is not sufficient to say that the complaint does not show a good cause of action, but must show in what respect it is defective.

The mere statement of the ground of demurrer, as specified in the Code, is not enough, but the party demurring must state distinctly the ground of objection.

The new rules of the supreme court do not apply to this motion. It was noticed before the rules took effect.

All motions in this court are made at chambers, and there is an express rule of the court, allowing this motion to be made there.

The motion is granted to strike out the demurrer, but the defendant may answer on payment of costs of motion.

 Practical Points.

PRACTICAL POINTS.

MARINE INSURANCE.—TOTAL LOSS.

In a recent case that came before the House of Lords, the following propositions were established with reference to what should be considered a total loss.

1. A vessel is totally lost, within the meaning of a policy, when it becomes a ship of no use or value to the owner, and is as much lost as if it had gone to the bottom of the sea, or had been broken to pieces, and the whole or greater part of the fragments had reached the shore a wreck.

A loss is also to be considered where a prudent owner, if uninsured, would not have repaired.

In a valued policy, the agreed total value is conclusive.

A policy of insurance is not a perfect contract of indemnity. It must be taken with this qualification, that the parties may agree before hand in estimating the value of the subject assured, by way of liquidated damages.

A ship was insured in a policy in which the value was stated at £17,500. The ship was injured by storms, was surveyed, and the repairs were estimated at £10,500. When repaired the vessel would have been of the marketable value of £9,000. The assured abandoned, and claimed as for a total loss. The jury found that, under the circumstances existing in the case, a prudent owner, uninsured, would not have repaired the vessel.

The House of Lords affirmed the judgment of the court below, that the assured could recover as for a total loss. *Irving v. Manning*, 1 House of Lord's Case, 287.

The following were the cases referred to in the judgment: *Allen v. Sugrue*, 8 B. & Cr. 561; *Young v. Turing*, 2 M. & Gr. 593.

 LIBEL.—PLEADING.

Though defamatory matter may appear only to apply to a class of individuals, yet if the description in such matter is capable of being, by *innuendo*, shown to be directly applicable to any one individual of the class, an action may be maintained by such individual in respect of the publication of such matter.

In such a case the *innuendo* does not extend the sense of the defamatory matter, but merely points out the particular individual to whom matter, in itself defamatory, does in fact apply.

Therefore, after verdict, a declaration which recited that the plaintiff was owner of a factory in Ireland, and charged, that the defendant published of him and of the said factory a libel, imputing, that in "some of the Irish factories (meaning thereby the plaintiff's factory) cruelties were practised," though there was no allegation otherwise connecting the libel with the plaintiff, was held good.

A. and B. may join in an action for a libel, containing imputations injurious to a trade carried on by them jointly as partners. *Le Fann v. Malcolmson*, 1 Ho. of Lords' Ca. 637.

SELECTIONS FROM RECENT ENGLISH DECISIONS.

House of Lords.

BENSON V. CHAPMAN.—*July, 3, 4, 1849. July, 9, 27, 1849.*

POLICY OF INSURANCE—SHIP—FREIGHT—TOTAL OR PARTIAL LOSS.

Upon appeal from the court of exchequer chamber, reversing the judgment of the court of common pleas: *Held*, that, where the master of a ship has elected to repair a ship, and the freight has been brought home, the owners cannot recover on a policy of insurance, either for a total or a partial loss, although the repairs exceed the value of the ship and freight.

THIS was an action brought on a policy of insurance, dated July, 1839, upon the ship *Lord Cochrane*, from Pernambuco to Liverpool, and was tried at the sittings of the court of common pleas, in London, for July, 1842. A verdict was given for the plaintiff, which was afterwards turned into a special verdict, subject to the opinion of the court on certain points; after hearing the arguments on which the court gave judgment for the plaintiff. The court of exchequer chamber had, however, on appeal, reversed that judgment, whereupon the present appeal was made against such reversal. The policy of insurance was underwritten by the defendant, as chairman of the Neptune Marine Insurance Company, upon the freight of the ship *Lord Cochrane*. The ship took her freight on board at Pernambuco, and was proceeding on her voyage, when, upon leaving the harbor, she struck on a bank and was rendered unseaworthy. She then put back for repairs, and was docked, and the necessary repairs made at a cost of more than £7000. This sum had been advanced by McCalmont & Co., on a bottomry bond pledging the ship, freight and cargo for that sum, and the bottomry premium of 20 per cent. The ship then brought her cargo to Liverpool. The plaintiff, it appeared, had, upon learning that the repairs would cost more than the value of the ship and freight, given notice to the defendant of abandonment, and that he would claim for a total loss. The ship, after discharging her cargo, was sold at Liverpool for £1600. The defendant's pleas traversed the plaintiff's interest, the loss of the ship, and of the freight, and the title of the plaintiff to abandon for a total loss.

Sir F. Thesiger and Barstow, for the appellant.

Sir F. Kelly, Martin, and Ogle, for the respondent.

9th July. ALDERSON, B., read the opinion of the judges on the question submitted to their lordships, whether the assured were entitled, under the pleadings, to recover, and said that the plaintiff in error was not entitled to recover under the facts found in the special

Court of the Master of the Rolls.—*Bridson v. Beneke et al.*

verdict, inasmuch as the freight had been earned, which was all the underwriters of the policy had engaged. The plaintiff, to be entitled to recover, must repudiate all the master had done at Pernambuco, and treat the ship and freight as wholly lost there. But assuming the master had done his duty in ordering the repairs, the plaintiff was bound by his election. Nor could the plaintiff recover as for a partial loss, for the whole of the freight had been earned as found by the jury.

The judgment having been printed and taken into consideration, on the 12th July,

Lord *Brougham* moved that the judgment of the court of exchequer chamber should be affirmed, and the appeal be dismissed with costs. The other peers present having concurred, judgment was given accordingly.

Court of the Master of the Rolls.

BRIDSON V. BENEKE AND OTHERS.—16th April, 1849.

INFRINGEMENT OF PATENT—TRIAL—INJUNCTION.

Where a verdict on a trial at law has been given in favor of the patentee, an injunction will be granted, although a bill of exceptions has been tendered.

THE plaintiff had invented improvements in stretching, drying or finishing muslins, and in the machinery by which the improvements were effected. He had been assisted by one Latham, and a patent was granted in the joint names. It was alleged that the defendant had infringed the patent and a motion for an injunction was made in Hilary term last, which stood over till a trial at law. The defendants pleaded, that Bridson was not the first inventor, that the invention was not new, and the specification imperfect. A trial took place, and a verdict was given in favor of the patentee, but a bill of exceptions had been tendered. It was now moved that notwithstanding the bill of exceptions, an injunction should be issued.

Turner and Humphreys, for the plaintiffs.

Roupell, Cole and Webster, for the defendants.

THE MASTER OF THE ROLLS.—Although the bill of exceptions may render the verdict of no avail, the court will not be absolutely bound by the decision at law; and under the circumstances an interlocutory injunction ought to issue.

 Vice-Chancellor's Court.—Attorney-General v. Wilshere.

Vice-Chancellor of England's Court.

ATTORNEY-GENERAL v. WILSHERE.—WILSHERE v. HARWOOD.—
24 April, 1849.

TESTATOR—NEXT OF KIN—VESTED INTEREST.

A testator gave certain sums of money to his daughter for life, with remainder to her children on attaining twenty-one or marriage; the children attained twenty-one, but died before the daughter:—Held, that they took vested interests.

THIS was an information against the representatives of a testator named Harry Harwood, by the crown, claiming to be entitled to certain property left by him to the children of Bishop Luscomb, who died without leaving any next of kin. The testator by his will dated in 1793, gave two sums of 1,500*l.* to his daughter, who was wife of the bishop, for life, with a general power of appointment, and in default of such appointment, to her children at twenty-one or marriage, as tenants in common. If no child or children of the marriage attained a vested interest, to his son, Harry Harwood for life, with power of appointment and divers remainders over. The testator afterwards by a memorandum expressed his intention to give 5,000*l.* 3 per cent. consols also to his daughter for life, with remainder to his said son and his lawful issue. His son was likewise thereby appointed his sole executor and residuary legatee. A declaration of trust to carry out the will was executed in November, 1810, but the memorandum, although placed with the will, was not proved. It appeared that Bishop Luscomb had three children, all of whom attained twenty-one, but died in the mother's lifetime. Bishop Luscomb was now dead, and no next of kin could be found; the crown claimed, therefore, the children's shares.

Cooper and Lewis, for the representatives of Harry Harwood.

The Solicitor General, J. Parker, Horace Twiss, Wray, Borrett and Earle, for the respective other parties.

THE VICE-CHANCELLOR.—The children of Bishop Luscomb took vested interests in the property, and the Crown is, therefore, entitled to their shares.
Decree accordingly.

GORDON v. HOPE.—23 Feb., 1849.

MARRIAGE SETTLEMENT—CONSTRUCTION—VESTED INTEREST.

Assignment of a fund to trustees under a marriage settlement held upon construction of the settlement to give children of marriage vested interests as they attained twenty-one and to their representatives if dead.

Court of Queen's Bench.—*Shaw v. The North and North Midland Railway.*

THIS bill was filed by the plaintiff, claiming a sum of 50,000 rupees under a marriage settlement. It appeared that this sum was assigned to trustees upon trust for the husband for life, with remainder to the wife for life, and after their deaths to be divided among the children or issue of the marriage who should attain the age of twenty-one, and survive their parents. Their children all attained the age of twenty-one; the two sons, however, died in the settlers lifetime, one unmarried and the other leaving a widow and three children, and the other child, a daughter, was the present plaintiff.

Bacon and Law, for the plaintiff.

Lloyd, for the son's widow.

Wigram and Swift, for the son's three children, cited *Evans v Jones*, 2 Coll. 516, and *Daltzel v. Welch*, 2 Sim. 319.

Martelli, for the executor of the other son.

THE VICE-CHANCELLOR.—The fund became vested in the children only, as they respectively attained twenty-one, and was payable to their representatives on their decease.

Court of Queen's Bench.

SHAW V. THE NORTH AND NORTH MIDLAND RAILWAY.—24th February, 1849.

RAILWAY CARRIERS—LIMITATION OF RESPONSIBILITY.

Where the defendants undertook to convey a horse, subject to the owner undertaking all risk as to the conveyance, and the horse was killed by reason of the insufficiency of the box in which he was placed:—Held, that the plaintiff could not recover in an action against the defendants as common carriers, whose duty it was to carry safely.

Quære, whether the plaintiff could recover if he had alleged in the declaration that it was the duty of the defendants to put the horse in a proper carriage, and that they had neglected their duty in this respect.

CASE, against the defendants as common carriers, to recover compensation in damages for the loss of a horse, which was killed whilst being conveyed in a horse-box on the line of railway. The declaration was founded upon the breach of the alleged duty on the part of the defendants to carry the horse safely. The defendants, by themselves, denied that they had undertaken to carry the horse safely, and alleged that they had expressly undertaken to convey the animal at the owner's risk. At the trial, it appeared that the horse's death was occasioned by the fastenings of the horse-box in which he was conveyed proving insufficient. It was proved that when the horse was delivered, a ticket was given to the plaintiff's servant with

Court of Common Pleas.—*Richards v. London, Brighton and South Coast Railway Co.*

this notice :—" This ticket is issued subject to the owner's undertaking all risk as to the conveyance, as the company will not be responsible for any damage done while being conveyed or on unloading." There was a verdict for the plaintiff, but a rule was afterwards granted to enter a non-suit.

Martin and *Addison*, argued the rule for the plaintiff, and

Knowles, for the defendant.

BY THE COURT, after consultation :—The ticket delivered to the plaintiff's servant at the time the defendants undertook to convey the horse, formed an essential part of the contract. The allegation that the defendants agreed to carry the horse safely was disproved by the notice affixed to the ticket. It might be, however, that notwithstanding the nature of the contract, if the plaintiff had alleged that it was the duty of the defendants to have put the horse in a proper carriage, and they neglected so to do, he might have recovered.

Rule absolute to enter a nonsuit.

Court of Common Pleas.

RICHARDS V. LONDON, BRIGHTON, AND SOUTH COAST RAILWAY COMPANY.—*5th and 7th May, 1849.*

RAILWAY COMPANY—LIABILITY AS CARRIERS.

A railway company is bound, not only to convey luggage entrusted to their care to the railway station, but to deliver the same at the usual place of delivery—the edge of the platform; and where a parcel was not so delivered, judgment for the plaintiff was maintained. *Seemle*, that placing a parcel openly in a railway carriage with a passenger, is sufficient to render the company liable as common carriers.

THIS action was brought to recover the value of a dressing-case containing valuable property, which had been placed in the railway carriage with the plaintiff's wife, and lost. The plaintiff's wife, on the 10th November, 1846, came in a fly from Bognor, Sussex, to the Woodgate railroad station, and took a ticket for London, and the article in question was placed under the seat of the carriage in which she travelled, by the fly-man. On the arrival in London, one of the company's servants undertook to see about the luggage, which was, with the exception of the dressing-case, placed in a cab and conveyed to the plaintiff's residence. The trial took place at Guildhall, before *Denman*, C. J., and a verdict for £150 was found for the plaintiff, leave being reserved to move to enter the verdict for the defendants, if the court were of opinion that they were not liable, under the circumstances, as common carriers.

A rule nisi having been obtained, *Byles*, Serjt., and *Bovil*, showed

Court of Common Pleas.—*Beard v. Egerton.*

cause against the rule, and cited *Robinson v. Dunmore*, 2 B. & P. 416; and *Story on Bailments*, 4th edition, sec. 538.

Talfourd, Queen's Sergt., and *Bramwell*, in support of the rule.

By THE COURT.—The duty of a common carrier is safely and securely to convey and deliver the goods taken as such carriers, it is immaterial to show negligence when the goods have not been so delivered. The contract was not only of conveying, but also of delivering according to the usual custom of railways, which is, on the other side of the platform. The parcel being put openly in the carriage was a sufficient placing the same in the company's custody, and as, therefore, they did not deliver it, their duty as common carriers had not been carried out, the verdict must be maintained and the rule discharged.

BEARD V. EGETON.—*January 18, 20; June 25, 1849.*

PATENT—SUFFICIENCY OF SPECIFICATION.

In the construction of a patent the court will read a specification so as to support it, if it can be supported, and where, therefore, it was apparent from the specification of a patent for taking daguerreotype likenesses, that a process which would have rendered the plates useless was not intended to be used in the manner supposed, the court made a rule absolute to enter verdict for the plaintiff, on an issue raised by a plea, setting out such supposed process as invalidating the patent.

THIS action was brought for the infringement of a patent in an invention for taking daguerreotype likenesses. The defendant pleaded, *inter alia*, that the specification was bad, as one of the processes, viz. to use acid after the coating of the plates with iodine, and which was stated to be indispensable in preparing the plates on which the likenesses would be produced, would render the plates useless. The verdict was directed on that issue for the defendant, with leave reserved to the plaintiff to move to enter a verdict for him in lieu thereof, if the court should be of opinion that the objection was not fatal. A rule *nisi* had been accordingly obtained to enter the verdict on the issue for the plaintiff.

Sir F. Thesiger, F. Robinson, and Webster, in support of the rule.

Watson, Q. C., Grove, and Brown, contra.

Cur. ad. vult.

25th June. By THE COURT.—Following the rules of construction as applicable to specifications, pointed out in the decisions of *Russell v. Cowley*, 1 Cr. M. & R. 846; *Neilson v. Harford*, 8 M. & W. 806; and *McAlpine v. Mangnall*, 3 C. B. 518, to the present case, it ap-

Court of Common Pleas.—Smith v. Thompson.

pears that specifications should not be calculated to mislead a person of fair intelligence, and in the construction of a patent the whole of the specification should be considered in support. Here it is sufficiently apparent that no process was intended to intervene between preparing the plate with iodine and using it to receive the picture, and the objection, therefore, cannot prevail.

The rule must be made absolute to enter the verdict for the plaintiff.

[Practice Court.]

Before Mr. Justice WIGHTMAN.

SMITH v. THOMPSON.—9th June, 1849.

MONEY TRANSMITTED FOR BUSINESS PURPOSES.

HELD, that the meaning of the expression "business purposes," in a letter containing a remittance of £100 for the same, was rightly left to the jury; as also, whether the plaintiff had wilfully disobeyed his instructions in appropriating a sum of £30 to the payment of his salary as clerk to defendant. And a rule for a new trial, obtained on the ground of misdirection, was discharged.

Held, also, that the amount of damages was in the discretion of the jury, and that as the judge who presided was satisfied with the verdict and the amount of damages, the court would not interfere with the finding of the jury.

THIS was an action of *assumpsit* on an agreement by which it was agreed that the defendant should employ the plaintiff as custom-house and shipping agent at Southampton, for the period of six months, at a salary of £120 a year, and also 50 per cent. on the gross profits of business to be newly introduced by him; and the defendant also agreed, at the expiration of the six months, to engage him for a further period of two years, and to increase his salary to £150 for the first year, and £160 for the second year. The plaintiff entered into the defendant's service in September, 1846, but was discharged in August, 1847, whereupon he brought this action for wrongfully discharging him from his employment before the period of his engagement had expired. The defendant pleaded *non-assumpsit*, and a justification, on the ground that the plaintiff had wrongfully and improperly appropriated moneys remitted to him for "business purposes" to the payment of his salary; to which the plaintiff replied *de injuria*. It appeared at the trial, that the plaintiff had repeatedly applied for payment of a portion of his salary which was then due, and that, not receiving the same, he had appropriated to the payment thereof £30, part of a sum of £100 which had been remitted to him for "business purposes." Correspondence, and other evidence, were given at the trial, to show that the plaintiff could not have understood this expression to include the payment of his salary. Mr. Justice Williams, who presided at the trial, left it to the jury to say what was meant

 Practical Point.

by "business purposes," and directed them, that if the plaintiff had acted wrongfully and wilfully, and contrary to what he reasonably believed were the instructions in the letter, they would find for the defendant, and if otherwise, for the plaintiff. A verdict having been found for the plaintiff, damages £185 12s. 6d., a rule nisi had been obtained for a new trial, on the grounds of misdirection, that the verdict was against evidence, and the damages excessive.

Byles, Sergt., and *Edwin Jones*, against the rule.

Murphy, Sergt., and *Pitt Taylor*, in support. The misdirection consisted, 1st. In the learned judges not deciding the effect and meaning of the letter in point of law, instead of leaving its construction to the determination of the jury; and, 2dly. In the statement of the question of disobedience to the instructions contained therein.

BY THE COURT.—The expression "for business purposes" was ambiguous, and the election on the evidence as to whether it would warrant the payment of clerk's wages or not, was therefore properly left to the jury, and it was not for the judge to construe its effect. The question, whether the plaintiff had acted knowingly contrary to his instructions, was that on which the parties had rested their rights at the trial, and was, therefore, rightly left to the jury to decide. As the judge who tried the cause was satisfied with the verdict given on the evidence adduced at the trial, the verdict must be considered consistent with the evidence, of which, in such a case, the jury were the best judges; the amount of the damage was also in the discretion of the jury.

The rule for a new trial must, therefore, be discharged.

PRACTICAL POINT.

CONTRACT.—POST LETTER.—DAMAGES.

A letter offering a contract does not bind a party to whom it is addressed to return an answer by the very next post after its delivery, or lose the benefit of the contract; an answer, posted on the day of receiving the offer, is sufficient.

A contract is accepted by the posting of a letter declaring its acceptance.

A person putting into the post a letter declaring its acceptance of a contract offered, has done all that is necessary for him to do, and is not answerable for casualties occurring at the post-office.

In an action for a breach of contract in the sale of goods, the measure of damages is not merely the amount between the contract price and the price at which such goods could be bought at the moment when the contract was broken; but likewise a compensation for such profit as might have been duly performed. *Dunlop v. Higgins*, 1 House of Lords' Cases, 381.

Cases cited in the judgment: *Stocken v. Collen*, 7 M. & W. 515; *Adams v. Lindsell*, 1 B. & Ald. 681; *Watts v. Mitchell*, Cases in Court of Sess., (1839,) 1157, 1163.

THE
New-York Legal Observer.

VOL. VII.] NEW-YORK, NOVEMBER, 1849. [MONTHLY PART.

ORIGINAL LETTERS.*

NO. I.

The following original letter of the late JOHN SLOSS HOBART, one of the Judges of the Supreme Court, to the Honorable Zephaniah Platt, then a Senator of this State, will be read, we are sure, with some interest. The late Judge Benson was then Attorney General, and he erected in the City Hall of New-York, a tablet to the memory of his friend Judge Hobart. The dispensing with real actions, such as they were when the letter was written, was not effected until *forty-seven* years afterwards. It is worthy of a perusal, as expressing the opinions of one of our old lawyers who lived before we had any New-York Reports.

Sharon, 6th January, 1783.

DEAR SIR—I wrote you the 4th curt. enclosing the draught of "an Act for the more easy Conveyance and Recovery of Lands," and sent my servant with it last night to Mr. Floyd, but he lost the letter out of his pocket, which has reduced me to the necessity of copying the act again, for fear that should not be picked up and sent to you.

I have long been of opinion that our mode of conveyancing ought to be made more simple. The present practice is built in fiction and was originally invented to evade laws which grew out of the feudal system; all the useful parts of that having been long since done away, why should we retain its superfluities, or more properly its excrescences? The first settlers of Connecticut adopted a simple and cheap form of conveyance which has stood the test of experience for a century and a half. There is no country where the titles to land are better assured, and where they are more seldom brought into question, why then should not we rid ourselves of the enormous expence of conveyancing, as it is now practised, and adopt a plain,

* We propose devoting a portion of our pages to the occasional publication of antique legal matters, and invite our correspondents to send us such communications as they may deem worthy of a place in our pages.

 Practical Point.

simple and less expensive mode, suitable to our circumstances ? It would be an invidious insinuation to suppose that it will be opposed by the gentlemen who are conveyancers by profession, as they must thereby sacrifice public good to private gain.

The second object of the bill is to extend the beneficial remedy of the action of ejectment, and remove an immense quantity of useless learning, which though it is at present little more than a dead letter, is still a part of our law, necessary to be known by the student, and at the same time is a heavy clog upon our whole system of jurisprudence. It may be objected, that it is dangerous to meddle with old foundations, as you may bring the whole fabric about your ears and perish in the ruins ; but to this I answer, that real actions have been long disused, and that of ejectment has been found from the experience of ages to be more simple, expeditious and cheap, and at the same time more advancive of justice ; if therefore the whole fabric of real actions was to fall to the ground, no danger would be apprehended since we have so good a building erected which answers the purpose much better than the old one, however venerable it may be on account of its antiquity. But to quit the metaphor ; if you should be in sentiment with me on the subject, I beg you will introduce this bill or a better one for the purpose, into the senate early in the session, that it may have a thorough consideration in its several stages. If you should approve of this draft, which I believe will not be found to be the worse for being short ; it may not, perhaps, be improper to show it to Mr. Attorney General, who upon revising it will suggest such alteration or amendments as shall appear to him necessary.

I sincerely wish you the gratulations of the season, and am with great esteem,

Your most affect. humble servt.,

The Hon. ZEPHANIAH PLATT, Esq. JNO. SLOSS HOBART.
Poughkeepsie.

 PRACTICAL POINT.

MARRIED WOMEN—REVERSIONARY INTEREST—MERGER.

THE rule has been well settled that a married woman cannot assign her reversionary interest in personal property so as to bind herself if she survive her husband ; a question of some importance with reference to the doctrine on this subject, lately came before the English court of chancery. It appeared that a fund in court was subject to a trust for a husband for life, remainder to his wife for life, remainder to their son absolutely, and the husband and son, by deed, surrendered and released their respective interests to the wife, for the express purpose of giving her a present absolute interest in the fund, and thereby enabling her to assign it at once to the son. A petition was presented by the three for payment of the fund to the son, but

U. S. Circuit Court.—*Hatfield v. Bushnell.*

the court refused the application, on the ground that a court of equity will not establish an equitable merger by analogy to law, where the effect would be to defeat its own rules and practice in the protection of married women from the marital control. *Whittle v. Henning*, 2 Phill. 731.

[THE following note of a recent decision in the United States Circuit Court, for the District of Vermont, is in a case which has naturally aroused a warm interest in the section where the tract in question is situated, from the number of titles it involves, and the difficulty of disentangling them during the pendency of the suit, of which the legislature has assumed the defence.

The cause will probably soon be brought to trial and argument and as it involves various important questions, upon which the advice of Chancellor Kent, Judge Haliburton, of Nova Scotia, Willis Hall, late attorney-general of the State, and other eminent counsel of New-York and Boston, has been taken.

And as the decision will be of interest, not only to the citizens of Vermont but to the bar generally, we shall publish the judgment and opinion of the court, *in extenso*, when they shall be rendered.]

U. S. Circuit Court.

[*District of Vermont.—May Term, 1849.*]

Before the Honorable SAMUEL PRENTISS.

PETER HATFIELD v. IRA BUSHNELL.

Ejectment for Lands in Starksboro'.—The plaintiff, a British subject, residing in Nova Scotia, claiming the *locus in quo*, by descent and purchase, under an original grant from the crown, made by the Governor of New-York, in 1774, brought this action, and after the first term died intestate.

The case was continued for several terms, the plaintiff's death being suggested, and the defendant thereupon filed a motion to dismiss, on the ground that the suit abated by the death of the plaintiff. And at this term, Charles D. Kasson having been duly appointed administrator on the plaintiff's estate, moved for leave to enter and prosecute the suit for the benefit of the heirs or whomsoever, which motion was also resisted by the defendant, on the grounds that the cause of action did not survive, and that said Kasson being a *citizen of Vermont, as was also the defendant*, the court was ousted of its jurisdiction, as both parties belonged to the same state.

N. Y. Superior Court.—*Randall v. Parker.*

The cause was argued, upon these points, by *C. D. Kasson* and *S. S. Phelps*, for the plaintiff, and

A. Peck, for defendant.

By the Court—*PRENTISS, J.*—*Held*, that an action of ejectment, pending in the circuit court in the district of Vermont, does not abate by the death of the plaintiff before judgment, but his administrator may, under the provisions of 31st section of the judiciary act, of 1789, become a party to the suit, and prosecute the same to final judgment. The *cause of action, by the local law, surviving* to the personal representative, and jurisdiction of the action having once vested, it continues, and may be exercised, notwithstanding the administrator may be a citizen of Vermont, residing in the same state with the defendant.

How far the right to recover may be affected, if at all, where the administrator comes in, in right of an alien, a subject of Great Britain, is a matter proper to be decided, not on a preliminary motion, but on the trial of the merits.

And the administrator was allowed to enter.

N. Y. Superior Court.

[*June and July Terms, 1849.*]

Before *DUER, MASON and CAMPBELL, Justices.*

ISAAC RANDALL v. HORATIO N. PARKER.

SALE OF GOODS—CHANGE OF POSSESSION—STATUTE OF FRAUDS.

An actual change of possession, in the 5th sec., title 2, of the statute of frauds, (2 R. S. p. 106,) means an open, visible, and public change.

The change must be of such a nature as to exclude the hazard of the debtor's deriving a false credit from the continuance of his apparent ownership.

The presumption of fraud which the statute raises from the continued possession by the debtor of goods alleged to have been sold, must be rebutted by evidence on the part of the vendee; and when no such evidence is given, the question of fraudulent intent ought not to be submitted to the jury.

The 5th sec., tit. 2, and the 4th sec., tit. 2, of the statute, must be so construed as to render them consistent with each other; but the latter would operate as a repeal of the former, if the question of fraudulent intent must be submitted to the uncontrolled discretion of the jury, when no evidence to rebut the statutory presumption has been given.

The statutory presumption is not rebutted merely by proof that the sale of goods, of which the debtor retained the possession, was founded on a valuable consideration, since a sale intended to be valid as between the parties, may yet be made with the intent of defrauding creditors.

The decisions of the Supreme Court, in *Collins v. Brush*, *Doane v. Eddy*, and *Randall v. Cooke*, which followed the rule in *Twyne's case*, have not been overruled by the decisions in the Court of Errors, in *Smith v. Acker*, *Cole v. White*, and *Hanford v. Aitcher*.

THE facts of the case sufficiently appear in the opinion of the court.

N. Y. Superior Court.—Randall v. Parker.

W. Watson, moved for a new trial, and relied on the following points :

1st. That the judge erred in refusing to charge the jury as prayed by the plaintiff's counsel, viz : " That if it has been made to appear on the part of the plaintiff, who claims under the bill of sale, that the same was made in good faith, and without any intent to defraud creditors, the plaintiff was entitled to recover." *Hanford v. Aitcher*, 4 Hill, 272, 328 ; *S. C.*, 1 Hill, 347 ; *Hoe v. Acker*, 23 Wend. 653 ; *Butler v. Van Wyck*, 1 Hill, 430 ; *Cole v. Sherman*, 24 Wend. 116 ; *S. C.* 26 Wend. 511.

2d. That the charge of the judge was erroneous, in stating " That there must be a change of possession, actual and continued, or it shall be conclusive evidence of fraud." 2 R. S. 2d ed. p. 70, §5, p. 72, §4 ; *Vance v. Phillips*, 6 Will. 433, opin. B. J.

3d. That the charge was erroneous, in stating the only evidence of " a delivery of the key to the father, and back again to the son." Whereas, the testimony of the landlord, Seaman, that on the 12th May the plaintiff became his tenant, showed that the property in question was in the plaintiff's possession by being in his house.

4th. That the charge of the judge was erroneous, in stating that the jury were to inquire, in the first place, if the sale was made on a sufficient consideration, and if there was a change of possession, and if satisfied there was such a change, they are to inquire, in the next place, was the sale made in good faith and without fraudulent intent.

5th. The judge erred in deciding that the question to the witness, Hugh Short, " to whom did he look for payment of his wages," was inadmissible. This question was in the nature of a cross-examination.

J. M. Smith and *H. H. Burlock*, for defendant, contra.

1st. The circuit judge properly overruled the question put to the witness, Hugh Short, as to whom he looked for payment of what was due.

2d. There is no error in the charge of the circuit judge.

Because, 1st. Proof of the debt being due from the son to the father, was not of itself sufficient to rebut the presumption of fraud, arising from the son's possession after the execution of the bill of sale. *Butler v. Van Wyck*, 1 Hill's Rep. 443 ; *Twyne's Case*, 3 Reports, 80 ; *Roberts on Fraud*. Cov. 548 ; *Hanford v. Archer*, 4 Hill, 277-8, per Walworth, chancellor ; *Smith v. Acker*, 23 Wend. 653.

Because, 2d. There was no actual change of possession of the goods conveyed by the bill of sale, within the intent of the statute. *Camp v. Camp*, 2 Hill, 628 ; *Hanford v. Acker*, 4 Hill, 271 ; *Hopkins*, Senator.

Because, 3d. There was no evidence in the case showing that the bill of sale had been made in good faith and without any fraudulent intent.

N. Y. Superior Court.—Randall v. Parker.

Because, 4th. And if there were any such evidence, the circuit judge sufficiently submitted such question to the jury.

3d. The motion for a new trial should be denied, with costs.

The case was argued at the general term, in June, 1849, and in the following July term,

DUER, J., delivered the following opinion of the court:—This is an action of replevin, in which the plaintiff seeks to recover certain goods, articles of household furniture, which had been levied upon by the defendant, as a deputy sheriff, under an execution against Theodore Randall, the son of the plaintiff. That the son was the original owner of the goods, and apparently retained the possession when the levy was made, is not denied; but it is alleged that the plaintiff became the owner by virtue of a bill of sale, executed and delivered to him by his son, on the 12th of May, 1845. The consideration expressed in the bill of sale is \$1100, in hand paid;—it is not pretended, however, that any cash was then paid, but the son, who was examined as a witness, swore that the true consideration of the sale was the sum of \$1100, monies borrowed from his father in 1845 and 6; for \$700 of which sum he had given promissory notes, which he produced upon the trial. There was no evidence, however, that those notes were surrendered to him when the bill of sale was executed, or that the plaintiff then delivered to him, or had ever delivered to him any receipt or other paper acknowledging the satisfaction of the debt, or explaining the purpose for which the bill of sale was given. The other material facts, as they appeared in evidence on the trial, are that the son, who had no funds whatever of his own, on the 6th of March, 1846, hired for one year the house 262 Broadway, and entered there into possession and kept the same for the purpose, as the lease expresses, of genteel bowling and billiard tables. Some of the furniture and the greater part of the fixtures he bought on credit.

Previous to the execution of the bill of sale he had been sued for a debt of more than \$200, and the plaintiff knew when he took the bill of sale that an execution upon the judgment recovered for this debt was about to be issued against him. The plaintiff, who resided at Newark, came to the city on the day the bill of sale was executed, and after or at the time of its execution, the son delivered to him possession of the goods by handing to him the key of the premises. The father then went behind the bar, handed back the key to the son and appointed him his agent to carry on the business. On the same day the son took down a sign bearing the name of "Theodore Randall," and put up another containing the name of "Randall" only, and he continued to carry on the business in the same manner he had done before. The only witness present at the sale was a person in the employ of the son as barkeeper. Another fact on which the plaintiff's counsel laid much stress in his argument is proper to be mentioned. On the 12th of May the son assigned to the father his lease

N. Y. Superior Court.—Randall v. Parker.

of the premises, but as this assignment was made two days before the sale of the goods, it is certain, that it was not designed to operate as a transfer of their possession.

The jury found a verdict for the defendant, and we are urged to grant a new trial upon exceptions taken to the charge of the judge, and to his exclusion of evidence upon the trial.

It is apparent from the statement that the case turns upon the construction to be given to those important provisions in the statute of frauds, which, as all of us must remember, were the subject of a protracted and not very amicable controversy between the former supreme court and the court of errors. A controversy that excited the general surprise and regret of the profession, and for some years kept a branch of the law that bears a more intimate relation than any other to the daily and necessary transactions of life, in a state of distressing uncertainty. The plaintiff's counsel appealed with confidence to the decisions in the court of errors as sustaining all his exceptions to the charge of the judge, and whatever may be the treatment those decisions have elsewhere received, we have not the slightest disposition to deny or evade their authority. We are deeply convinced, without meaning to dwell upon the topic, that there can be no stable or consistent administration of justice, unless the decisions of the court of ultimate jurisdiction shall be implicitly followed and obeyed by all subordinate tribunals; and hence those decisions, when their grounds are distinctly understood, will always be regarded by us as conclusive evidence of the existing law.

We apprehend, however, that the true import of the decisions now in question has been greatly misunderstood. We have diligently examined, and we may add, studied the decisions of the court of errors in the cases of *Smith & Hoe v. Acker*, 23 Wend. 653; *Cole & Thurman v. White*, 26 Wend. 511; and *Hanford v. Aitcher*, 4 Hill 272; and we are satisfied that the doctrine which they establish is in no degree inconsistent with the opinion we shall proceed to deliver.

The supreme court had decided, in effect, that the presumption that a sale or mortgage of chattels, of which the possession was unchanged, was made with the intent of defrauding creditors, can only be rebutted by positive evidence, that owing to the situation of the parties, or of the goods, the immediate delivery, and actual change of possession which the statute requires, could not be effected; while the court of errors, in reversing their judgments, has held (and such is now the law,) that even where the possession of the goods is intentionally suffered to remain in the debtor, every fact and circumstance, tending to disprove the existence, in fact, of a fraudulent intent, may be given in evidence, and must be submitted to the jury. But the court of errors has not decided that a mere symbolical delivery and constructive change of possession, are sufficient to meet the requisitions of the statute, and exclude the presumption of fraud; nor that the presumption is sufficiently rebutted by proof that the transaction was founded on a good or valuable consideration; nor that the presumption, when not contradicted by proof, may yet be

contradicted and overruled by the verdict of a jury ; or, to express our meaning in a few words, the court of errors has not decided that the jury, in the exercise of a plenary discretion, may repeal the statute.

We proceed briefly to explain our own views as to the construction of the statute, and to show their application to the facts of the present case. The first clause in the 5th section, tit. 2, of the chapter relative to fraudulent contracts and conveyances, our present statute of frauds, so far as it relates to a sale of goods, is in these words: "Every sale made by a vendor of goods or chattels in his possession or under his control, unless the same be accompanied by an immediate delivery, or be followed by an actual and continued change of possession of the thing sold, shall be presumed to be fraudulent and void, as against creditors or subsequent purchasers in good faith." In this clause, the word "actual" is the most important and significant, and demands a special attention. It is plainly used in opposition to "virtual" or "constructive." An actual change as distinguished from that which by the mere intendment of the law follows a transfer of the title, is an open, visible public change, manifested by such outward signs, as render it evident that the possession of the owner, as such, has wholly ceased. It was the intention of the legislature, that a debtor who wishes to free himself from the imputation of fraud, when he parts with his title to goods, must also part with their use and enjoyment, so as to exclude the hazard of his deriving a false credit from the continuance of his apparent ownership, and this intention, recommended as it is by the strongest reasons of public policy, we shall endeavor, upon all occasions, faithfully to execute. The construction that we now adopt, was given to the statute by the Supreme Court in *Camp v. Camp*, 6 Hill, 628, and so far from having been repudiated by the Court of Errors, it received the full and emphatic approval of the learned senator, who in *Smith v. Acker* and *Hanford v. Aitcher*, delivered the opinions that probably had the greatest influence upon the judgment of the Court. (Opinion Hopkins, Senator, 4 Hill, 271.)

Applying then the test of this construction to the present case, it is certain, that no evidence was given of such a delivery of the goods and change of their possession as the statute requires. The change was constructive and secret, not actual and apparent. The goods remained in the same house, in the same position, applied to the same uses, and so far as the public had any means of judging, in the possession and under the control of the same person, as owner. The substitution of a sign bearing only the surname "Randall," if intended not to mislead but inform the public, was a pretence and a mockery, and the delivery of the key, although symbolically a delivery of the goods as between the parties, in respect to creditors, was an idle and unmeaning ceremony. The learned judge, therefore, following the words and in the spirit of the statute, should have instructed the jury that they were bound to presume that the alleged sale, so far as it affected the rights of creditors, was fraudulent and void.

The presumption, however, of a fraudulent intent which the statute creates, is not *juris et de jure*, but may be contradicted by proof upon the part of those against whom it is alleged. The section we are considering proceeds to say, that the facts upon which the presumption is founded, shall be conclusive evidence of fraud, unless "it shall be made to appear on the part of the persons claiming under such sale, that the same was made in good faith, and without any intent to defraud such creditors or purchasers." It must be observed, that the words of the statute are not that if it shall appear to the jury that the sale was not made with an intent to defraud creditors or purchasers, they may disregard and overrule the opposite presumption, which the statute adopts. The decision of the question is not left to their discretion, but the non-existence of a fraudulent intent must be made to appear on the part of those who claim under the sale. The meaning of this provision is clear and unambiguous. It casts the burthen of proof upon the person who asserts the validity of the sale. It requires him to show affirmatively that the real intention of the parties involved no such fraud as the law imputes to them, since it is manifest that the existence of the fraudulent intent, that otherwise must be presumed, can only be disproved by evidence that the actual intent was fair and honest. We are aware that it has been frequently asserted that when no such evidence as we have stated has been given, the question of a fraudulent intent must still be submitted to the jury, and its determination be left to their uncontrolled discretion. Such, it has been alleged, is the just construction and necessary effect of the 4th section in the 3d title of the same chapter which declares, "that the question of fraudulent intent in all cases arising under the provisions of the chapter, shall be deemed a question of fact and not of law." Our opinion as to the true construction of this section, is widely different. We cannot assent to an interpretation that renders the salutary provisions in the preceding 5th section a dead letter, and virtually expunges them from the statute. It is a contradiction in terms to say that certain evidence *when not contradicted*, is conclusive, and that the same evidence, although *not contradicted*, may be rejected. Conclusive evidence is that which must be followed; it takes away all exercise of discretion; it establishes the fact it is adduced to prove, and it cannot be rejected by judges or jurors without a violation of their duty and their oaths. The two sections under consideration, although found in different titles, are parts of the same law, and were enacted at the same time, and it would therefore be unreasonable to suppose that the latter was intended to repeal the former. The fifth section was originally reported by the revisers in a different and more stringent form, and had its repeal been intended, instead of being studiously amended by the legislature, as it actually was, it would have been stricken from the law. The provisions in each section, we are bound to presume, were equally intended to have the force of law, and hence to render them operative and effectual, we are bound to give to them a consistent interpretation. Nor is such an interpretation at all difficult. The question of fraudulent intent, is indeed

N. Y. Superior Court.—Randall v. Parker.

a question of fact, but it is to be submitted as such to the determination of the jury, exactly upon the same terms and conditions as all other questions of fact which it is their province to determine. The existence or non-existence of a material fact, can only be properly found by a jury when the requisite proof—the evidence that the law deems to be applicable to the fact, has been given by the party upon whom the burthen of proof is devolved. Hence, when the statute declares that a fraudulent intent shall be presumed, unless a contrary intent is proved, the jury, when no such proof has been given, has no right to deny by their verdict, the existence of the imputed fraud, and if in the exercise of power without right, such a verdict is rendered, it must of necessity be set aside as contrary to law.

The next inquiry is, what is the nature of the proof that the party asserting the validity of the sale, is bound to give, in order to rebut the statutory presumption of a fraudulent intent? The statute gives the answer. He is bound to prove, 1st, that the sale was made in good faith, and 2d, without any intent to defraud creditors and purchasers; for it is a serious mistake to suppose that those two questions are identical in meaning. The latter words are not superfluous, they are not in technical language mere surplusage; they were necessary to explain the whole intention of the legislature; they were necessary to give the sanction of the legislature to an important principle, by which the courts of law and equity in interpreting and enforcing successive statutes of frauds, have invariably been governed. The good faith of the parties, in the restricted sense in which the terms are here used, is evinced by showing that the sale was not colorable and fictitious, but was founded upon a valuable, and as the parties believed, an adequate consideration, and was intended to operate as a valid transfer of the ownership; but it is certain that such a sale may yet be fraudulent in respect to creditors. Even where a full consideration is actually given, the governing or leading motive of the parties may have been the design of preventing the application of the goods sold to the payment of the debts of the vendor, and this is the fraudulent intent which the statute imputes to them, in every case in which the vendor is permitted to retain the possession of the goods. Hence it is this intent that must be disproved, even where the sale is real and effectual. The validity of the sale and the absence of a fraudulent intent, are distinct and independent facts, both of which are necessary to be proved, and proof of the first, in no degree, alters or lessens the obligation of proving the second.

The distinction we have thus stated is by no means novel, but the rule of evidence, which it suggests, has prevailed from a very early period in the history of the law. The earliest statute of frauds is the 13 Elizabeth, Cap 5, and the earliest case under that statute is *Twyne's case*, 3 Rep. 81. In that case, as in the present, the consideration of the sale was the satisfaction of an antecedent debt, and the vendor was permitted to retain the possession of the property sold. The chancellor, and the two common law judges by whom he was assisted, were unanimously of opinion that the consideration,

N. Y. Superior Court.—*Randall v. Parker.*

which was admitted to have been proved, was wholly insufficient to rebut the presumption of an intended fraud upon creditors. The authority of this decision has never been denied or doubted; on the contrary, the rule which it established, is admitted by all the text writers, and has been followed in all the subsequent cases in the English reports, and this is so certain that the citation of authorities to prove it would be a waste of time, and an idle ostentation of research. It is true, that there is no statute in England, and never has been, which declares that the continued possession of the vendor shall be presumptive or conclusive evidence of an intent to defraud his creditors, but it is manifest that whether the presumption of fraudulent intent is an inference drawn by judges, or declared by statute, can make no difference in the nature of the proof by which alone it can be rebutted. Hence, we assent entirely to the propriety of the decisions of our supreme court in the successive cases of *Collins v. Brush*, Wend. 9, 198; *Doane v. Eddy*, 16 Wend. 523; *Randall v. Cook*, 17 Wend. 56; in each of which the rule in *Twyne's case* was held to be applicable to the construction of our present statute. Had we even been compelled to refuse our assent to the propriety of these decisions, we should still have held ourselves to be bound by their authority, since we deny that their authority has been overturned, or in any degree shaken, by the subsequent determinations of the court of errors, in *Smith v. Acker*, *Cole v. White*, and *Hanford v. Aitcher*. In each of these latter cases not only was a valuable consideration proved, but many additional circumstances had been offered in proof to rebut the presumption of a fraudulent intent, and it was upon these additional circumstances that the senators, who were in favor of reversing the judgments of the supreme court, manifestly placed their chief reliance. In neither case did a single senator express or intimate an opinion, that had a valuable consideration alone been proved, or offered to be proved, the cause could properly have been submitted to the determination of the jury; but the refusal of the supreme court to admit evidence of additional facts, was in each case the sole cause of the reversal of the judgment.

The application of our remarks to the facts in the present case, is seen at once to be decisive. Admitting that the reality of the sale was sufficiently proved, there was not a particle of evidence to disprove the existence of a fraudulent intent; not a particle of evidence to contradict the presumption that the statute raised, and the facts in the case so forcibly suggested, that the real object of both father and son, purchaser and seller, was to secure the property from the grasp of the impending execution; in other words, to defraud the judgment creditor. Under these circumstances, the learned judge should have instructed the jury, that the presumption of fraud was rendered by the terms of the statute conclusive evidence of the fact.

The observations we have made, relieve us from the necessity of examining in detail the exceptions that were taken to the charge of the judge, since, if these observations are just, it is a necessary consequence that the exceptions are groundless. Some of the expres-

N. Y. Superior Court.—*Isham v Williamson.*

sions used by the learned judge may not have been entirely accurate, and were certainly liable to misconstruction, but his charge, taken as a whole, was much more favorable to the plaintiff than his counsel had any right to expect. He distinctly submitted to the jury the question both of a change of possession and of a fraudulent intent, and whether all the remarks that accompanied this submission were critically just, it is needless to inquire; since, if we have rightly construed the statute, these questions ought not to have been submitted to the jury at all. There was no evidence of a change of possession, no evidence to rebut the presumption of a fraudulent intent, and the learned judge would have been fully justified in directing the jury to find a verdict for the defendant, as the only verdict that, without disobedience to the statute, they could possibly render.

A single exception, independent of those to the charge of the judge, remains to be noticed. One of the witnesses, the bar-keeper, swore that a portion of his salary was still due to him; he was asked to whom he looked for payment, and the judge is supposed to have erred in overruling this question. Whether the question was proper in itself, we shall not inquire, since, had it been answered as the plaintiff wished, the answer could not have affected the merits or law of the case. In fact, the question had been already answered. The witness had sworn that he had been employed by the plaintiff alone, and, consequently, it was the plaintiff only who could have been liable to him for his wages.

The exceptions are overruled, and the motion for a new trial denied, with costs.

[*At Chambers.*]

Before Mr. Justice MASON.

ISHAM, Receiver, &c, against WILLIAMSON and another.

MOTION TO STRIKE OUT PLEADING FOR REDUNDANCY, &c.

Where an objection is taken to a pleading, on the ground of irrelevant or redundant matter being inserted, it must be taken within the time limited by the Code for putting in an answer or a reply.

Where, therefore, it appeared that the time for the plaintiff to reply had been extended beyond the twenty days, and an application was afterwards made to strike out certain passages in the answer, as being redundant and irrelevant: Held, that the application was too late.

Expressions of opinion merely, and insinuations tending to throw discredit on the motives of a party, need not be replied to.

It is only material allegations, not controverted by the answer or reply, that are to be taken as true.

THIS was a motion to strike out certain passages in the answer of the defendants as being irrelevant, redundant and immaterial.

The answer was served on the 28th August, 1849, and at the expiration of the twenty days from the day of service, the plaintiff ob-

N. Y. Superior Court.—*Isham v. Williamson.*

tained a consent from the defendants' attorney for time to put in his reply.

The passages in the answer proposed to be stricken out, were in reply to the allegations in the complaint as to the character of one of the parties referred to in the cause, and if replied to would, probably, have formed immaterial issues.

Charles T. Cromwell, in support of the motion, contended that the passages referred to in the answer were inartificially pleaded, and that the plaintiff could not, therefore, reply thereto.

Samuel Owen, contra, submitted that the plaintiff should have taken his objection to the sufficiency of the answer before he obtained an extension of time to reply; that not having done so, he was too late with his application.

MASON, J.—It was the established rule in the court of chancery, that the defendant could not except to a bill for impertinence, after he had obtained further time to answer; because, the obtaining the order was a submission to answer, and all objections to the bill were thereby waived. (1 Barb. Ch. Pr. 101.) And, for the same reason, he could not demur to the bill after he had obtained an extension of the time to answer. There is nothing in the Code at variance with this salutary rule; on the contrary, its whole scope is to confine within proper limits objections which are dilatory in their very nature. In this case, the time for the plaintiff to reply has been several times extended by consent, without any intimation of the existence of irrelevant matter in the answer, and it is, therefore, now too late for the plaintiff to move to strike out such matter; or, as we would express it under the former practice, to except to the answer for impertinence.

The plaintiff, however, need not be embarrassed in his reply by reason of any irrelevant matter in the answer. Statements which have nothing to do with the case, and are, therefore, immaterial, expressions of opinion merely, and insinuations tending to throw discredit on the motives of the plaintiff, if found in the answer, need not be replied to. No evidence could be given to support or defeat them—and no inference, therefore, can be drawn unfavorable to the plaintiff for his omitting to notice them. It is only a material allegation, which, if not controverted by the answer or reply, is to be taken as true, (§ 168.) The plaintiff's motion to strike out must be denied, but without costs, as the question now presented has not, that I am aware, been decided with regard to pleadings under the Code.

The time to reply is extended for ten days from the service of the rule hereby granted.

U. S. District Court.—Marshall v. Bazin.

U. S. District Court.

(Southern District New-York.)

Before the Honorable S. R. BETTS, District Judge.

[IN ADMIRALTY.]

CHARLES H. MARSHALL AND OTHERS v. MARELLIN BAZIN.*

Libel *in personam* to recover balance of passage money for which a bill of exchange had been given but not paid. The libellant offers to surrender the bill.—Suit sustained.

Held, That Admiralty has jurisdiction of contracts for the transportation of passengers by sea, and which may be exercised both *in rem* and *in personam*.

That the new Imprisonment Acts of the State of New-York, as adopted by the Acts of Congress of Feb. 28, 1839, and Jan. 14, 1841, (5 Stat. U. S. 321. 410,) do not apply to process issued out of Courts of Admiralty.

That the processes of these courts are subject to the regulation of the Supreme Court by virtue of the Acts of Congress of May 8, 1792, c. 2.; and rules the Supreme Court adopted pursuant to those acts are authoritative and conclusive on the subject.

That Rules 2 and 3 of the Supreme Court give parties the right to a warrant of arrest, and to the advantage of bail to satisfy the final decree rendered in a cause.

That the respondent was properly held in custody if the libellant had a subsisting right of action.

That the prospective operation of the act of 1841 is negatived in this respect by that of 1842.

That taking personal security for such demand by promissory note or bill of exchange will be regarded a waiver of the remedy in Admiralty and bar proceedings, while such security remains outstanding.

That delivering up the security upon the hearing, is a sufficient compliance with the principles of law applicable to the case to prevent the respondent avoiding the action by a preliminary motion.

That the jurisdiction of the Admiralty *in personam* in matters of contract, has no connection with the question of "lien." The party is proceeded against upon his personal liability by process of arrest or citation.

THE respondent with his family, came passengers from Havre, in France, to this port, on board the packet ship ———, owned by the libellants. He contracted to pay two thousand francs for the passage, one half to be paid in advance, and the other half in New-York on the arrival of the ship here.

The advance was duly paid, and for the balance the respondent drew a bill of exchange on himself, payable at sight at Delmonico's & Co. in New-York.

The bill was duly presented and accepted by the respondent, and not being paid, the libellants sued out of this court a warrant of arrest against him for the balance of his passage money, on which, for want of bail, he was imprisoned.

A motion was now made in his behalf, to discharge him from arrest,

* This case should have preceded the Supreme Court cases, but was by mistake omitted.

U. S. District Court.—*Marshall v. Bazin.*

and to dismiss the libel and proceedings as not within the jurisdiction of the court.

H. D. Sedgwick, for the respondent, made the following points :

(1.) A contract for passage money is a personal contract, not within admiralty jurisdiction. (1 Gilp. 184 ; 2 Camp. N. P. 431.)

(2.) Imprisonment for debt is abolished by act of Congress.

(3.) Liens *in rem* or *in personam* in maritime courts, are waived by acceptance of a personal or other security, and by taking the bill of exchange in this case, the libellant relinquished his lien, and the contract no longer continues within admiralty jurisdiction. (Bee's R. 167 ; 1 Wash. C. C. R. 393 ; 1 Dods. 283 ; 1 Paine C. C. R. 572 ; 12 Wheat. 616 ; 1 Sumner's R. 75 ; 2 Hagg. R. 136 ; 2 Wood & Minot, 92 ; Abbott, 283 ; 7 Peters' R. 345 ; 4 Camp. N. P. 150 ; 2 Marsh. 399 ; 15 Johns. R. 276 ; 2 McLean's C. C. R. 594.

(4.) If the waiver was not complete by taking the bill of exchange, the lien is lost from the lapse of time allowed before suit brought. (2 Wood & Minot C. C. R. 92.)

Philip Hamilton, for the libellant :—

(1.) The affidavit of the respondents on which the motion is founded, does not state that the bill of exchange was taken in satisfaction or discharge of the antecedent debt. It only alleges it as received as security therefor. He cited against the application, 3 Cro. R. 193 ; 1 Evans' Pothier, 380 (a) 386 ; 12 Wheat. 611 ; 1 Cowen, 290 ; 3 Cranch, 311. 316 ; Cro. Car. 85 ; 2 Black. 317 ; 1 Cranch. 191.

The counsel produced the bill of exchange in court, and declared his purpose to surrender it on the hearing of the cause.

October 13. BY THE COURT.—The cases cited on the first point do not support the position that Admiralty has no jurisdiction of contracts for the transportation of passengers by sea. The case in 1 Gilp. 184, was a claim set up by the master of a vessel by way of answer, upon the proceeds of wrecked goods brought into port in his vessel. He had agreed to bring to the United States the crew of a wrecked vessel for \$20 each, passage money, and he also laded on board his vessel such of the cargo of the wreck as had been saved. This cargo was libelled and condemned for salvage at the suit of that crew, and the master sought to attach a lien upon such salvage interests to satisfy their indebtedness to him for passage.

The Court decided that no lien existed in his behalf, and that the property condemned was not brought in the ship as the property of the seamen, and was not answerable for their personal contracts. That the money in court, was not of the nature of surplus and remnants on which an independent debt could be fastened.

Judge Hopkinson remarks, in the course of his opinion, that the demand is " strictly a personal contract, not made at sea, nor for any

U. S. District Court.—Marshall v. Dazin.

cause cognizable in admiralty." No authority is cited in support of the doctrine, excluding the case from the cognizance of the court for these causes; and the case referred to in 2 Camp. 632, rests upon the opposite principle, for it recognises a contract for the transportation of a passenger, as our giving a lien upon his luggage, and maritime liens arising from services by or to a vessel, are the familiar subjects of admiralty jurisdiction. It is not yet decided, that the method of remedy, in *rem* or *in personem*, determines the jurisdiction of the court.

But the rule is definitively settled, so far as the courts of this district are concerned, by the decisions of the Circuit and District Court, upon the precise point.

It was held in this court, that a passenger had a remedy against the vessel for breach of contract by the master, to bring him and his family from a foreign port to the United States, and could recover back the money advanced on the agreement, and damages for the violation of it. (*Carr v. Barque Zenobia*, 10 vol. Decisions, MSS., 51; *McDonald et al v. Ship Aberfoyle*, 12 vol. Decisions, MSS. 35.) The last case was appealed to the Circuit Court, and was, after full hearing, affirmed; this point was made the essential one on the appeal.

It has also been decided by this Court, on full consideration, that the non-imprisonment acts of the state of New-York, as adopted by the Acts of Congress of February 28, 1839, and January 14, 1841, (5 Stat. U. S. 321, 410,) do not apply to process issued out of Courts of Admiralty. The processes of these courts are subject to the regulations of the Supreme Court, by virtue of the Acts of Congress of May 8, 1792, § 2, and August 23, 1842, (5 U. S. Stat. 518, § 6,) and accordingly the rules of the Supreme Court, adopted pursuant to those Acts, are authoritative and conclusive on this subject. (11 vol. Decisions, MSS., 12; *Lockwood and others v. Pearson*, 15 Ibid. 33.) Rules 2 and 3 of the Supreme Court, give parties the right to a warrant of arrest, and to the advantage of bail, to satisfy the final decree rendered in the cause, and the respondent in this case is properly held in custody, if the libellant has a subsisting right of action in this court. The prospective operation of the Act of 1841, is in this respect intercepted by that of 1842.

The third and fourth points raised by the respondent, present the only matters of contestation open before this court in the cause.

The jurisdiction of the court over the subject matter may be lost to the party, or be waived by him, by any act of his indicating that this special remedy is relinquished.

Taking personal security for the demand, by promissory note or bill of exchange, will be regarded a waiver of the remedy in admiralty and bar proceedings in this court, whilst such security remains outstanding. (*Murray v. Lazarus*, 1 Paine, 572; 12 Wheat. 616; *Ramsey v. Allegre*.) But that admiralty has cognizance of the demand *in personam*, is distinctly implied in that case, and is explicitly

U. S. District Court—Cure v. Bullus.

decided in that of the *General Smith*, (4 Wheat., 438, *Peroux v. Howard*, 7 Peters, 324,) and that it was intended so to settle the doctrine, is made certain by the remarks of Judge Story, speaking for the Court, in *Andrews v. Wall*, (3 How. 572, 573.)

On the argument of the motion, the advocate for the libellant produced the bill of exchange, and declared his purpose to deliver it up on the hearing of the cause. This is a sufficient compliance with the principle embodied in the cases, to prevent the respondent avoiding the action by this preliminary motion.

It is further noticeable, that the affidavit of the respondent does not aver that the bill was drawn by the agent of the ship at Havre or that he accepted it as a satisfaction of the demand. The implication therefore is that it was but a liquidation of the demand, and a memorandum of the time it was payable, and not intended by the parties to be made a security for the debt.

The jurisdiction of the court *in personam*, in matters of contract, has no connection with the question of *lien*. The party is proceeded against upon his personal liability by process of arrest or citation.

This remedy, if suspended by taking a bill or note, is restored to the creditor, when the debtor is released of the hazard of having negotiable paper in circulation against him, by its being surrendered him or produced in court and cancelled.

The motion to dismiss the libel is accordingly denied, and the respondent must be put to his defence to the action. The costs will abide the final result of the suit.

Decree accordingly.

[IN ADMIRALTY.]

PETER CURE, *Assignee of BENSON F. TOWN, Libellant*, v. WILLIAM A. BULLUS, *Respondent*.

In asking a discharge from a bail bond, in admiralty, the parties must place their claims upon the same footing as if the relief sought was from a money bond.

Fraud, deceit, duress or illegality of consideration—some matter showing the obligation void *ab initio*, or rendered inoperative by something subsequently accruing, must be established to affect its validity.

The undertaking of bail is absolute and not conditional, and cannot be discharged by producing the principal in court.

THIS was an action brought by the assignee of a material man against the owner of a North River craft for supplies furnished. The suit was *in personam*, and pursuant to the rules of the Supreme Court of the United States in cases of that description, the defendant was arrested, and a resident of the village of Newburgh, Mr. Farnham, became *fidei jussor*, or stipulator, for the respondent.

Application was made by the stipulator to be relieved from his undertaking.

U. S. District Court.—Clure v. Bullus.

The condition of the undertaking was, that if the respondent should personally appear before the District Court of the United States for the Southern District of New-York, on the 11th day of September inst., at the City Hall in the city of New-York, to answer the said libel and abide by all orders of the court, interlocutory or final, and pay the money awarded by the final decree in the suit, then the undertaking would be void.

The application came on to be heard at the present term.

Erastus C. Benedict, on behalf of the bail, read affidavits of the bail, the respondent, and one Robert Proudfit, jun., of Newburgh, attorney at law, to the effect that the respondent was arrested at Newburgh by one Brown, a deputy marshal, who, at the time of the arrest, represented that the undertaking was merely for the appearance of the respondent, and that the respondent had twelve days to appear.

That the bail was thereby deceived and induced to sign the undertaking, which he would not have done had he been aware of his true position. And further, that the respondent, his principal, was entirely insolvent and unable to pay a dollar to the bail in case the bail were rendered liable on this undertaking; and further, that Proudfit, the attorney, told the bail that the marshal was correct. The counsel urged that this court, under its equitable power, had the right to relieve the bail from his undertaking in a case like this, where it was evident that there had been, to say the least, a mistake of his liability—and offered then and there to surrender his principal.

D. McMahon, Jun., of counsel for the libellant, read affidavits in opposition to the motion, showing that no instructions had been given to the deputy marshal to make any such representations; and also, an affidavit of the deputy marshal that a lawyer named Proudfit had been present and advised with the bail at the time of his entering into the undertaking, and that the attorney and the bail read the bonds; and urged the following points:—

1st. That the undertaking of the bail in the admiralty was in the nature of a stipulation for the debt, and he became thereby a *fidei jussor* for the principal, and that neither the surrender of the principal nor even the death of the party could discharge the bail. 2 Bro. Civ. and Ad. Law, 412; Hall's Ad. Prac. 25, n.

2dly. That the representations of the deputy marshal were not directed to be made by the libellants, and they were nothing more than the representations of a third party, and consequently the libellants could not be bound by them.

3dly. That it appeared that the stipulator read the conditions of the bonds, which were plain and easy to be understood.

Oct. 13, 1849. PER CURIAM.—The defendant moves that three bail bonds entered into by him and Samuel F. Farnham to the marshal of this district be vacated, or that the bail be relieved therefrom on the surrender of the respondent in the respective suits.

The respondent was arrested on the tenth day of September last, at Newburgh, upon three warrants *in personam*, returnable in this court on the eleventh of September, and the same day gave the bonds in question to the marshal.

The condition of each bond is made conformably to Rule 3 of the Supreme Court, and is, that the respondent "Bullus, shall personally appear before the District Court of the United States for the Southern District of New-York, on the 11th day of September instant, at the City Hall of the city of New-York, to answer the said bill, (which is previously stated and the cause of action,) and abide by all orders of the court, interlocutory or final, and pay the money awarded by the final decree of the said court," &c.

Bonds were duly signed and sealed by the respondent and his bail, and thereupon he was discharged from arrest in the three suits. The bonds, (except names of parties, dates, and the sums of money in demand, \$52 97 in one ; \$246 69 in one, and \$49 50 in the other, in the respective suits, and for what cause,) are in print.

The respondent by his own affidavit, sets up in avoidance of the bonds, that he inquired of the deputy marshal who served the warrants, what the effect and obligation of the undertaking was, and the officer informed him and his bail that it was nothing more than to secure the appearance of the respondent, who had twelve days after the return day of the process to come into court and perfect his appearance. The bail swears to the same statement of facts, and asserts that he subscribed the bonds in reliance upon those representations and he would not have undertaken for the debts.

A lawyer in the village of Newburgh was consulted by the principal and bail before the bonds were executed, who says he questioned the deputy marshal and was informed by him that the respondent had twelve days after the return day of the process within which to enter his appearance, before judgment would be entered against him and that by signing the bail bonds the bail would become liable no further than for the appearance of the defendant ; and upon that information deponent told the bail he would be safe in signing the bonds. The attorney further swears that he is not a proctor of this court, or familiar with its practice, but in glancing over the bail bonds, he was of the impression that the obligors were only bound for the appearance of the defendant and he so informed them. He further says, he is counsel for the respondent and knows his affairs intimately and that he is entirely insolvent.

An affidavit of the deputy marshal is also added, stating that he supposed a defendant had a certain number of days to enter his appearance after the return day of the writs, and so represented it to the defendant and his bail, in good faith, and solely for the purpose of giving them information to which he supposed they were entitled.

After the above papers were served and notices of the motion given, the deputy marshal drew up a statement in his own hand-

U. S. District Court.—Cure v. Bullus.

writing and made oath to it, detailing with more particularity the representations he made on the subject. He says he had no conversation at all, he believes, with the bail, who began signing the bonds as soon as he came into the room where the parties all were, the attorney reading over to him a part of the bond while he was in the act of signing. That the attorney inquired of the witness what was the meaning of *return day* of the warrants and whether the defendant had not some days after that to enter his appearance and if it was not twelve days. The witness answered that he was new in the business and could give no certain information, but he supposed that was the effect of the undertaking, although he could not say that it was twelve days to which the party would be entitled; and that he did not attempt to give any advice or certain information on the subject; it was a casual talk with the lawyer and deponent certainly did not intend to mislead any of the parties. The attorney intimated that he understood the nature of the undertaking and said he thought time was given the respondent after the return day, and that the time was twelve days.

The effect of the application upon these facts is, that the bail be now allowed to surrender the principal, to which the principal assents; or, that he be discharged from the bonds, as having been executed by him under an entire mistake induced by the deputy marshal, of the nature of their obligations.

The admiralty practice does not admit of a surrender of the principal in exoneration of bail. The *appearance* of the party arrested, which the bail stipulation guarantees, is not for the purpose of having the person of the respondent present to satisfy the final decree of the court. It is to secure his attendance to submit to interrogatories or sanction intermediary proceedings to which his concurrence may be necessary in the progress of the suit, or to put in and perfect the bail for the defendant, which the stipulation in the arrest may be only preliminary to. (*Clarke's P.* tit. 4, 5, 12. 1 *Brown Civ. & Ad.* 256; 2 *ib.* 361, note.) In maritime courts, the stipulation and the *appearance* of the party is denominated *prætorian*, that is, an undertaking to the court, and not to the adversary party. (*Clarke's Praxis*, tit. 9; 2 *Brown Civ. & Ad.* 355. 357.) But when bail by bond or stipulation is given, the obligation imposed on the *fides jussores* is, *judicatum solvi*, that is, to see the costs and condemnation paid at all events. (3 *Blac. Com.* 292; *Hall's Ad. Practice*, 12, 29; 2 *Brown Civ. & Ad.* 356,) and this enures to the creditor or actor as an absolute security. (*Wood Civ. Id. B.* 3, ch. 3, § 2.) In our practice this obligation may be entered into on the arrest. (*Sup. C.*, Rule 3.) This undertaking is not discharged or affected by the surrender of the principal. (*Hall's Pr.* 25, note (20); 2 *Brown Civ. & Ad.* 412, note (21); *Conkling's Ad. P.* 458,) and it matters not whether the obligation is assumed on the arrest by bond, or on appearance, by stipulation.

In the sense of the common law applicable to bail, the bail in admiralty are *absolutely fixed* from the time the bond or stipulation is entered into. There is no alternative in the undertaking, as at common

U. S. District Court.—Care v. Ballus.

law, which being performed acquits the obligation. Nor will the bankruptcy of the parties, or laches in prosecuting the suit, discharge the bail. (1 Dods. 2, *The Vreede*. 1 Wm. Rob. 195, *The Harriet*.)

The stipulation rests on the doctrine of principal and surety in contracts, and is governed by the rules of law and equity applicable to those contracts, (1 Wm. Rob. 197. *The Harriet*.) with the additional consideration, that as the undertaking is not only to satisfy the action but to abide the adjudication of the court, in the matter, it is entitled to a more enlarged consideration in admiralty than at law, and when given as a substitute for the thing arrested, may be enforced beyond the mere money amount recovered by the promovent. (1 Dods. 53. *The Nied Elwyn*.)

In asking a discharge, therefore, from a bail bond, the parties must in admiralty, place their claim upon the same footing as if the release sought was from a money bond of any other denomination. Fraud, deceit, duress or illegality of consideration or some matter showing the obligation void, *ab initio*, or rendered inoperative by something subsequently occurring, must be established to affect its validity.

Courts of admiralty are governed by equitable principles, (2 Wood. & Minot, 60,) but equity will not cancel an obligation, because the contracting party misapprehended the extent of his liability under it, unless he has been misled by the acts or declarations of the one benefited by it. Mistake in the law, resulting from the inattention or ignorance of the party bound, will not be regarded in equity as a reason for avoiding a contract. (1 Story Eq. § 111, 113, 6 Johns. Ch. R. 169.)

Here can be no reasonable ground for alleging a mistake or misapprehension of any fact connected with the transaction. The bail bond received by the parties, stipulated that the respondent should appear in court on a day designated and that the stipulators would pay the money awarded by the final decision of the court. These two facts were directly brought home to their notice, at least the evidence that they were so must be regarded as conclusive against the obligors. The mistake and ignorance alleged in their behalf then is, that they did not understand the legal effect of their contract, and supposed it was limited to the appearance of the party. Even if this excuse rested upon an engagement complex or equivocal in its terms, there would be great difficulty in bringing it within any recognised principle of courts of equity, affording relief to obligors against their contract. But when the stipulation is explicit and plain, and the mistake set up is, that the interpretation given the contract by others was confided in and not the words, the whole reason for interference of equity is taken away. It must, moreover, be considered that the misapprehension asserted here, was no way induced by the libellant. He was not present when the bond was executed and had taken no part in bringing the obligors into the agreement. It was wholly voluntary with them and sought for independent of his concurrence or knowledge.

Nor were the representations of the deputy marshal in fact or law, chargeable upon the libellant.

If that officer had chosen to say, the bail bond was an idle formality, that the respondent was not in law bound to give bail; that the court would cancel the bond on its presentation before them; and that no liability whatever could be incurred by the bail in signing it, such representations, however confidently accepted by the obligors, could never in law or equity operate to release them from their obligation.

In all such suggestions the deputy would not be acting officially, or as agent of the libellant, and as to him and the marshal, or as well as the respondent and bail, could be a mere stranger making representations upon his individual responsibility alone.

His representations, however, if erroneous, it is conceded, were made innocently and from ignorance on his part and with no purpose to mislead the respondent or his bail. Misrepresentations of that character even made by an agent empowered to form a contract, would not invalidate it as to his principal. (*Early v. Ganet*, 9 B. and Cr. 928, 17 Com. L. R. 522; *Cornfoot v. Fowke*, 6 Mees. & Wells. 358. More especially, if his principal is also innocent of any misstatement or concealment leading to the contract. (*Ibid.* and cases referred to by the court.)

The deputy marshal after making the first deposition, drew up in his own handwriting a more detailed and explicit statement of the part he took in the transaction, and it certainly would appear from this amended oath, that he all the while gave the attorney and party who referred to him, to understand he had no knowledge of the practice of the court in this respect, and merely coincided with suggestions made to him by the attorney, that the undertaking of the bail was not absolute, and said nothing with intent to persuade or incline the parties to sign the bonds. That the attorney seemed satisfied with his own construction of the bonds, and his impressions of the practice of the court, and that the bonds were signed in pursuance of his advice and assurance and not upon any representations of the deputy.

Without placing this decision upon the facts put forth by the respective affidavits, as to the conversation with the deputy, I hold that no deceit or misrepresentation is proved, which in law or equity entitle the obligors to be relieved from the bonds; that the undertaking of the bail is absolute and not conditional, and cannot be discharged by producing the principal in court. He stands before this court on these bail bonds, precisely as he would at common law, or on his recognizance on the lapse of eight days after the returns of the capias against him, absolutely responsible for the judgment, (1 *John. Cas.*, 329, 334; 2 *ibid.* 483; 2 *John R.* 101; 9 *ibid.* 84; 1 *Tidd's P.*, 620.

The motion does not raise the question whether the libellant is entitled to exact bail in these cases. That matter will more properly come up, when an attempt is made to enforce the bonds, or may be presented on a distinct motion to the court.

As the case stands, and upon the assumption that the respondent was bound to give bail, I am compelled to say, no authority exists in

Court of Common Pleas.—Goldsmith v. Marpe.

this court to interfere with the rights acquired by the libellant under the respective bail bonds executed in these causes, and the motion must therefore be denied.

The parties having acted in good faith in making this application, and as it presents a new point of practice, I shall not order costs.

N. Y. Common Pleas.

[October Special Term, 1849.]

Before Judge DALY.

WILLIAM GOLDSMITH *against* AUGUSTUS MARPE.

PRACTICE—COSTS.

It is irregular to include costs in entering up judgment, without giving the two days' notice required by the Code; and if judgment be entered up without giving such notice, the court will order a retaxation with costs of motion, and require the plaintiff to strike out the costs from the record.

The irregularity in the entry of the costs does not, however, affect the regularity of the judgment.

THE facts appear in the opinion.

By the Court—DALY, J.—The plaintiff moves to vacate an order obtained by the defendant, setting aside a judgment which the plaintiff had entered up by default against the defendant. The defendant obtained an order for the plaintiff to show cause why the judgment should not be set aside, upon the ground that the plaintiff had procured the clerk to insert the costs and charges of the plaintiff in the entry of judgment, without giving the two days' notice to the defendant required by § 311 of the Code; and upon the return day of this order the motion was adjourned. Two orders were made for the adjournment by Judge Ulshoeffer. One to the defendant of the 9th of October, the other to the plaintiff for the 13th.

On the 9th, the defendant appeared and took his motion by default, entered a rule setting aside the plaintiff's judgment, and served his answer to the complaint. This rule the plaintiff now moves to vacate. There was evidently a mistake in granting the two orders for the adjournment. There is nothing to show that either order was obtained collusively, and as neither party can derive any advantage from that mistake, the plaintiff, as a matter of practice, is entitled to have his motion to vacate the defendant's rule granted, without costs. But the defendant insists that the judgment is irregular, and is therefore properly set aside. The inserting of costs in the entry of judgment is certainly irregular, without giving the two days' notice. Formerly a party might tax his costs without notice, and enter up his judgment, subject to a motion for a retaxation, which motion, however, he

Review.

might anticipate and avoid by giving notice of retaxation and offering to deduct the overplus of costs, if any, upon the execution. This practice was founded upon a rule of court. But the giving two days' notice of the charges for costs is now a matter of statute regulation, and cannot be dispensed with. It is irregular to enter them without such notice, and a party will be compelled to retax them, or they will be stricken out upon motion, with costs. But this irregularity does not affect the judgment—that is given by the court—and the insertion of the charges for costs in the entry of judgment is a mere ministerial duty performed by the clerk. If the defendant, therefore, had moved on the ground of that irregularity alone, his motion would have been granted with costs. But he moves, also, to be let in to defend upon the merits. This is a matter of favor, the judgment being regular, and will not be granted except upon terms. We will grant it without imposing upon him the costs of the motion. But he will be required to pay the costs of entering up the judgment, and the judgment must stand as security.

Review.

THE HISTORY OF THE USURY LAWS, and a Stricture thereon—Exhibiting its Influence upon Commerce. By John B. Coppinger, A. M. New-York: Van Norden & King, Stationers, No. 45, William-street. 1849.

A VERY interesting pamphlet on the Usury Laws has been laid before us. The intention of the writer is to show that the usury laws should be abolished. He has divided his pamphlet into two parts. He first gives us the history of usury, and afterwards points out the effects of the usury laws upon commerce. We do not think with the writer that the law should be entirely abolished, but there can be no doubt but a partial repeal of the usury laws would be beneficial. We regret that we cannot find space for a few quotations from the work: we cannot, however, resist making the following extract therefrom, which, we think, contains much good sense:—

"If a man is *compos mentis*, why should he not be allowed to give and receive any price he thinks fit, for money, as well as for any other article? and why should the legislature scrutinize the terms of a private contract for trade between individuals, if they are competent to manage their own affairs? It will scarcely be said that the same necessity for such enactments exists at this day, that called them forth in earlier times. In other words, that we have made no advance in the science of trade: that the infant state of commerce requires the fostering care of legislation: that the lawyers, doctors and farmers, who principally make the sum of our legislators, know better what is for the advantage of the mercantile interests, than do the merchants themselves; and, lastly, that our merchants must be restrained and prevented from cheating and robbing each other.

"What, then, after all, is the effect of our usury laws? It embarrasses business, keeps up the rates of interest, *usually paid*, induces a laxity of principle among the people, in respect to the obedience of our laws, and, in fact, offers a premium for unfair dealing. It checks the exercise of enterprise, and throws a stumbling-block in the way of commercial advancement."

Queen's Bench.—Keymer v. Lawrie and others. Forth v. Simpson.

SELECTIONS FROM RECENT ENGLISH DECISIONS.

Queen's Bench.

Before the Four Judges.

KEYMER v. LAURIE AND OTHERS, 18th April, 31st May, 1849.

NEW TRIAL—MISDIRECTION—DISHONOR OF BILL.

The making a bill payable at a bankers is sufficient authority for them to honor it, and the acceptor ought to have given notice not to pay the bill if he had so intended.

THIS action was brought against the defendants, as trustees of the London Joint Stock Bank, for refusing to honor a cheque for £7 11s. drawn on the bank by the plaintiff who had an account there. The plaintiff had accepted a bill for £42 payable at the defendants' bank, and it was accordingly paid on being presented, although the defendant had only £21 4s. of the plaintiff's money in their hands. A further cheque for £13 13s. was also paid, but the cheque for £7 11s. drawn for the balance, was dishonored.

At the trial at the sittings after Hilary Term, Lord Denman directed the jury, that the circumstance of the plaintiff's having made the bill payable at the defendant's bank, was an authority for them to pay it; whereupon the defendant's obtained a verdict. An application was made for a rule *nisi* to set aside the verdict, and for a new trial on the ground of misdirection.

Crowder, Q. C., in support of the rule.

Cur. adv. vult.

BY THE COURT.—There has been no misdirection as to the plaintiff. If he wished the defendant not to pay the bill, he ought to have given notice to the defendant to do so.

Rule refused.

FORTH v. SIMPSON.—23d May, 1849.

LIEN OF TRAINER ON RACE-HORSES—EXCLUSIVE POSSESSION.

IN order to entitle a trainer to a lien on race-horses for their keep and training, he must show that he is entitled to their exclusive possession, and therefore, where the defendant might have them when he pleased, for racing or otherwise: Held, that he was not entitled to his lien.

THIS was an action to recover 256*l.* claimed by the plaintiff, for the keep and training of three race-horses, which had been taken in execution by the defendant, and a verdict passed for the plaintiff, sub

Queen's Bench.—*Rambalon v. Whalley.*

ject to the opinion of the court, whether the plaintiff had a lien on the horses in respect of their keep and training.

A rule *nisi* having accordingly been obtained to enter the verdict for the defendant.

Shee, Sergt. and *Bovill*, in support of the rule.

Wyatt and *Ogle*, contra, citing *Jackson v. Cummins*, 5 M. & W. 342; *Scarfe v. Morgan*, 4 M. & W. 270; 1 Horn & H. 292; *Bevan v. Waters*, 3 Car. & P. 520; M. & M. 236; *Jacobs v. Latour*, 2 M. & P. 20; 5 Bing. 130.

BY THE COURT.—In general, a trainer has a lien on race-horses in respect of their keep and training, but he must show that he was entitled to the exclusive possession of the horses. Here, however, it is clear that the defendant might have possession of the horses, whenever he liked, for the purpose of running them, and the plaintiff had not therefore a lien upon them.

The rule must accordingly be made absolute.

RAMBALON v. WHALLEY.—31st May, 1849.

ARBITRATOR.—ACTION BY SURGEON.—UNSKILFULNESS.—EVIDENCE.

Where the subject matter of an action brought to recover a sum for attendance of a surgeon on the defendant's wife, was referred to an arbitrator: Held, that the arbitrator was bound to admit evidence to prove the unskilfulness of the plaintiff; and where, therefore, he had rejected such evidence, a rule was made absolute to set aside his award.

THIS was an action brought by a surgeon to recover the sum of 34*l.* 10*s.* for attending the defendant's wife during her confinement. The defendant pleaded a set-off by payment of 10*l.*, and also payment into court of 10*l.* Before the trial, however, the matter was referred under a judge's order to an arbitrator, who was a surgeon. The arbitrator had refused to admit evidence to prove the unskilfulness of the plaintiff, on its being objected to by the plaintiff's attorney, on the ground that it was not admissible under the pleadings. Upon the award being made, a rule *nisi* had been obtained to set it aside, on the ground of such rejection of evidence.

Burcham now showed cause against the rule, and contended that although the arbitrator had wrongfully rejected this evidence, which was tendered for the purpose of reducing the amount of the debt and damages, yet as the parties had agreed to be bound by his award, it could not be set aside, unless there appeared to be a mistake on the face thereof.

G. Rochfort Clarke, in support of the rule, was not called upon.

In Exchequer.—*Gall v. Lindsey*.—*Mills v. Guardian of Alderbury Union*.

BY THE COURT.—The arbitrator ought to have received the evidence, as the question of the plaintiff's unskillfulness was involved in the value to be placed on his services. The rule must, therefore, be made absolute to set aside the award.

Court of Exchequer.

GALL V. LINDSEY.—9th June, 1849.

STATUTE OF FRAUDS—AGREEMENT TO PAY DEBT OF THIRD PARTY.

A ship-broker entered into an agreement with certain ship-owners to procure a vessel to be chartered in consideration of his commission, and he was to pay the same out of the receipts of the freight. Some change took place in the owners, and on the return of the vessel they promised, not however in writing, to pay the commission on his foregoing his claim to collect the freight: Held, that under the statute of frauds, the promise should have been in writing, as being an agreement to pay the debt of a third party.

THIS action was brought on a special agreement by the plaintiff, a ship-broker, who agreed with the owners of a vessel to procure a party to charter her, in consideration that he was to receive the freight so as to reimburse himself throughout for the amount of his broker's commission. The defendant pleaded *non assumpsit*. The ship was chartered, proceeded on her voyage, and returned to England. Some change had however taken place during her absence amongst the owners, and when the plaintiff, pursuant to his agreement, which was not in writing, proceeded to collect the freight, the defendants undertook to pay him his broker's commission if he would forego his right to collect the freight, and would allow them to obtain immediate possession of the ship. They, however neglected to perform their promise, whereupon this action was brought, and a verdict given for the plaintiff. The defendants having obtained leave to move to enter the verdict for them, or for a nonsuit, on the ground that the promise to pay the plaintiff his commission ought to be in writing under the statutes of fraud, a rule *nisi* was obtained.

BY THE COURT.—The agreement was in the nature of a promise to pay the debt of another, as the debt for the plaintiff's commission remained due from the original owners of the vessel and should therefore, under the 29 Car. 2, c. 3, have been in writing.

Rule absolute to enter a nonsuit.

MILLS V. THE GUARDIANS OF THE ALDERBURY UNION.—13th Feb., 1849.

MONEY HAD AND RECEIVED—PAYMENT IN IGNORANCE OF FACTS.

A surety who has paid money for which he is not legally liable, in ignorance of facts, may recover it back in an action for money had and received.

In Exchequer.—Boosey v. Purday.

THE plaintiff, with another person, executed a joint bond to the defendant as surety for William Bird Brodie, a banker, at Salisbury, who was appointed treasurer to the Union. The firm of which William Bird Brodie was a partner, became bankrupt in the year 1848, with a balance in their hands, belonging to the Guardians of the Alderbury Union; and the plaintiff having been called upon by a clerk of the Union to make good the deficiency, paid into the bank of Messrs. Smith & Everett, with whom the defendants had opened an account, on account of the defendants, the sum of £154 12s. 6d., taking Smith & Everett's receipt, and the sum so paid by the plaintiff was entered in Smith & Everett's books to the defendant's credit. It afterwards turned out, that the balance due to the Union, when W. and G. Brodie stopped payment, had not been paid to the credit of William Bird Brodie, but had been paid, by the order of the defendants, into their account with "Messrs. Brodie & Co., the treasurers of the Union," considering the firm as the joint treasurers of the Union, and orders had been given on "W. & G. Brodie;" and it was contended that the sureties, not being liable for monies not traced to the sole possession of their principal, the plaintiff was entitled to recover back the money. On the other hand, it was insisted that the possession of the firm was that of each partner.

This point was argued upon a rule to set aside a verdict for the plaintiff for the sum paid, and enter a non-suit.

M. Smith, in support of rule.

Crowder and Barstow, contra.

BY THE COURT.—The plaintiff paid money which he was not liable to pay, in ignorance of the facts, and he is entitled to recover back the money so paid, in an action for money had and received to his use. The verdict is right, and the rule for a non-suit must be discharged.

BOOSEY V. PURDAY.—26th April and 5th June, 1849.

A foreigner has no copyright in works published by him at common law or by statute, and the assignee of a foreigner, although a British subject, stands in the same position as the assignor.

THIS was an action to recover damages from the defendant for the infringement of the plaintiff's copyright in ten airs of the opera *La Somnambula*. At the trial before *Pollock*, C. B., at the London sittings after Trinity Term last, it appeared that Bellini, the composer, had, in February, 1844, assigned his copyright, according to the Austrian laws, to Ricardi of Milan, who, in June, 1844, assigned them to the plaintiff in England. The plaintiff then registered the airs in pursuance of the international copyright act of 1842. Nine of the airs

In Exchequer.—Wakley, Jun. v. Healey et al.

were published at Milan and Paris at nine o'clock in the forenoon of June 10, 1831, and about two hours later in London, and the remaining air in London in June, 1831, and at Milan in August, 1831. The Lord Chief Baron directed the jury that the plaintiff had not established an exclusive right to the copyright in the nine airs, but had as to the tenth. Verdicts having been returned accordingly, cross-rules were obtained to set aside the verdict on the ground of misdirection.

The *Attorney General* and *Compton*, for the defendant.

Bovil and *Webster*, for the plaintiff.

Cur. adv. vult.

BY THE COURT.—The case of *D'Almaine v. Boosey*, 1 Y. & C. 289, in which Lord Abinger, C. B., held that foreign authors were entitled to copyright in their publications in England, and might enforce it, is not satisfactory. Such copyright must be acquired by statute, as none exists at common law, and in looking at the preamble of the statute of Anne, it appears that it was "to encourage learned men to compose and write useful books," for the improvement of the citizens, it must be presumed, of this country, either by birth or residence. A British subject who becomes the assignee of a foreigner, has no better title than the assignor, and has, therefore, no copyright, and the publishing abroad simultaneously makes no difference in the question.

WAKLEY, Jun., v. HEALEY and another.—2d, 4th June, 1849.

LIBEL—PROOF OF BY-LAW—NEW TRIAL—MISDIRECTION.

In an action for libel, which imputed to the plaintiff, a surgeon, unprofessional conduct, whereby he had rendered himself liable to be expelled the college under its by-laws:—*Held*, that the proof of the existence of the by-law was material, and that it was not enough that it was alleged in the libel, and a rule *nisi* was made absolute for a new trial.

THIS was an action for libel, to recover compensation for certain articles in the *Medical Times*, charging the plaintiff, who was one of the surgeons to the Royal Free Hospital, Gray's Inn Lane, with unprofessional conduct in "puffing" his surgical operations in the *Lancet* and *Times*, and stating that he had thereby rendered himself liable to be expelled by the college of surgeons. The declaration, after alleging such libels, stated, that the college, under the charter and by-laws, had power to expel for unprofessional conduct. The defendants expressly traversed this allegation, and it was not proved that any member of the college had at any time been expelled for unprofessional conduct. The Lord Chief Baron *Pollock*, who presided at the trial, having held that the averment of the existence of the by

Court of Exchequer.—*Virtue (a Pauper) v. Painter.*

in the libel was sufficient evidence of the fact there alleged, a general verdict was given for the plaintiff, with 40 shillings damages. A rule *nisi* had, therefore, been obtained to set aside such verdict, and for a new trial, on the ground of misdirection, and that the verdict was against evidence.

Martin and *Bramwell*, showed cause against the rule.

Wilkins, Sergt., *Dearsley* and *Mills*, contra.

By THE COURT—(after taking time to consider).—It is material to show that a by-law exists conferring the power of expulsion from the college for unprofessional conduct, and the mere statement in the libel is not sufficient proof of the by-law, and the rule for new trial must, therefore, be made absolute.

Nisi Prius.

Before Mr. Justice ERLE.

VIRTUE (a pauper) v. PAINTER.—23d January, 1849.

FALSE IMPRISONMENT—REASONABLE AND PROBABLE CAUSE.

In an action for false imprisonment upon a charge of felony, the question of malice is for the jury, but the question of reasonable and probable cause is exclusively for the judge to determine.

THE plaintiff, a cabman, was found at ten o'clock at night in a yard where he was accustomed to come to hire cabs, harnessing his horse to a cart belonging to the defendant, and the defendant gave him into custody, upon a charge of attempting to steal his cart. The plaintiff suing in *forma pauperis*, brought an action for false imprisonment. Upon the proof of these facts, Erle J., left it to the jury to say if the defendant had been actuated by malice, and intimated his opinion, that if the defendant had reason to believe the plaintiff intended to steal his cart, there was no ground for supposing he was influenced by any malicious motive. The jury, after some discussion, found that the defendant was actuated by malice, and gave the plaintiff a verdict with 10*l.* damages.

Bothwith and *Symons*, for the plaintiff.

Holligan, for the defendant.

Erle, J., said—He had left all that he ought to the jury, and then came the question of reasonable and probable cause; and that was for him. As at present advised, it seemed to him there was reasonable and probable cause. The plaintiff must, therefore, be non-suited, but with leave to move to enter a verdict for the plaintiff, if the court should be of opinion there was an absence of reasonable and probable cause.

Plaintiff non-suited.

Court of Exchequer.—Cherry v. Henning and Needham. Elliot v. Thompson.

Before Baron PLATT.

CHERRY V. HENNING AND NEEDHAM.—11th May, 1849.

DEED OF SALE OF PATENT.—DELIVERY.

Semble, that where a deed had been formally delivered it was of no moment that the signature had not been affixed, as that was not necessary to give effect to a deed.

THIS action was brought to recover certain instalments due from the defendants under a deed alleged to have been made by them on the purchase of a patent taken out by the plaintiff's late husband. They pleaded *non est factum*. On production of the deed the signature of Needham was affixed as well as the attestation to the same and to the delivery, but there was no signature attached to the seal set apart for Henning, nor any attestation of delivery by him. The deed, however, came from the custody of Henning.

Watson, Cowling and T. Jones, for the plaintiff, contended, that the deed had been formally delivered by Henning, producing a written notice served on the plaintiff from both the defendants, in which the deed was referred to as an indenture between themselves of the one part and the plaintiff of the other.

Knowles and Bramwell, for Henning, urged that the execution of a deed could not be assumed in the absence of direct affirmative evidence of the execution.

BY THE COURT.—The signature of the defendant to the deed is not necessary to give effect to a deed where there has been a delivery. The question for the jury, therefore, is whether from the evidence they may or may not conclude that Henning had delivered the instrument as his act and deed.

A verdict was thereupon returned for the plaintiff for the balance due on the purchase of the patent.

Before Mr. Justice COLERIDGE.

ELLIOT V. THOMPSON.—15th May, 1849.

SLANDER—VARIANCE IN DECLARATION—AND EVIDENCE OF WORDS SPOKEN.

The plaintiff in an action of slander, for words spoken at an inquest on a fire, set out in the declaration, that the defendant had said that he entertained strong suspicion of some one having had a hand in the mysterious affair, and that the plaintiff was the person who had done it. It appearing from the evidence, that the plaintiff's name had not been mentioned: Held, a fatal variance, and the court refused to amend the declaration, but nonsuited the plaintiff.

THE plaintiff was a livery stable keeper, carrying on business in

Review.

George Yard, Drury Lane, and landlord of the defendant, who was a stationer, and resided in King's Head Court, Fetter Lane. It appeared that on the night of the 30th August, 1848, a fire broke out on the defendant's premises, and that an inquest for the purpose of inquiring into the origin of the fire; was held by Mr. Payne. The inquest was adjourned several times, and on the 6th of September, the defendant said, that he had a strong suspicion that "some one had had a hand in this mysterious affair." The plaintiff was acquitted on the inquest from all blame.

One of the jurymen, and a short-hand writer present at the inquest, proved that the defendant had not mentioned the plaintiff by name, although he had said that he suspected some one who had set the premises on fire.

Wilkins, Serj., and *Huddleston*, for the plaintiff.

Chambers, Q. C., and *Meymott*, for the defendant, contended that inasmuch as there was a variance between the evidence and slander alleged in the declaration, which set out that the defendant had added the words, "and Mr. Elliott is the person who had done it," to those above stated, the plaintiff ought to be nonsuited.

BY THE COURT.—This variance is fatal. The plaintiff must be nonsuited. The Court refused to amend the declaration.

Review.

A TREATISE on the Practice of the Courts of the State of New-York, adapted to the Code of Procedure as amended by the act of April 11, 1849, and the Rules of the Supreme Court; to which is added the Practice in Courts of Justices of the Peace, with an appendix of practical forms. By CLAUDIUS L. MONELL, Counsellor at Law. Albany; GOULD, BANKS & GOULD. New-York: BANKS, GOULD & Co., Nassau-street, 1849.

MR. MONELL has rendered an essential service to the practical lawyer, by the publication of this work. It was much needed in the profession, and he has fairly fulfilled the promise made by him to "bring together the whole body of the practice, and in a simple and succinct form." The work is divided into chapters, and each section of the Code is commented upon and illustrated, as far as it was capable of being done, by the citation of recent decisions. Where the old practice is applicable, the author has, with much good sense, selected all the leading cases from the books to bear upon the subject. It is certainly the best work, with reference to the practice under the Code, that has been printed, and cannot fail to have a very large circulation.

The author observes—"Should the present work meet the immediate demands of the profession, for a guide in conducting a suit, it is the author's design, at no very distant day, when the system shall become better understood, and been established upon a firm basis, unshaken by the conflict of opinion and decision, to revise the present volume, and bring together in a body the entire practice of the courts of this State."

The work is dedicated to the Honorable Ira Harris, one of the justices of the Supreme Court, and pays a well-merited mark of respect to that learned gentleman for his eminent qualities as a judge and a man.

THE
New-York Legal Observer.

VOL. VII.] NEW-YORK, DECEMBER, 1849. [MONTHLY PART.

•• We understand the several articles which have appeared in this work on the subject of Endorsements, bearing the signature of "Leges," are shortly to be re-published in a small volume, with notes and references.

N. York Supreme Court.

Before Mr. Justice MAYNARD.

**PARLIAMENT BRONSON and DEBORAH ANN BRONSON his WIFE, and
GEORGIANA E. WOOD, *an Infant*, v. ST. PETER'S CHURCH, *Auburn.***

A woman on the decease of her husband acquires a right *in action* merely in a church pew and her subsequent marriage gives her second husband no interest in the pew, prior to her dower being assigned to her in the pew, owned by him.

The Vestry of Churches in communion with the Protestant Episcopal Church as Trustees under the Statute of New-York, have the legal right to alter the church edifice.

Accordingly held in this case, where the alteration consisted in the addition of new pews in front of the plaintiffs' pew, and the removal of the pulpit and chancel sixteen to twenty feet farther off, that such enlargement was within the powers of the trustees, and a motion for an injunction denied.

Held, also, that the absolute deed of a church pew in perpetuity is only the conveyance of the right to THE USE OF THE PEW DURING DIVINE SERVICE in the nature of a lease-hold estate, and gives the holder no claim that the relative situation of the internal parts of the church shall not be altered; nor that the church shall remain unaltered unless damages shall be paid or secured.

THIS was a motion for an injunction on a complaint filed by the plaintiff.

The complaint stated that the defendants' church edifice was erected in 1833, and that George H. Wood purchased pew No. 55 in said church; that he was a subscriber for the building of the church, and received the amount of his subscription in the said pew, and a deed for the same without reservation or qualification; that he was a regular attendant at the church until February, 1844, when he departed this life intestate, leaving the plaintiff, Deborah Ann, his widow, and Georgiana E. his only child and heir at law, now an infant; that the plaintiff Parliament Bronson, was married to the said Deborah Ann in August, 1845: that the former church was built in an oblong form, with the pulpit and chancel in the centre of the north end, with an aisle in front of the chancel, and running through to the wall on each side; that pew No. 55 was the *fourth*

N. Y. Supreme Court.—*Bronson and others v. St. Peter's Church.*

pew in number from the said cross aisle on the western wall side and pleasantly situated, and that its pecuniary value consisted essentially in its location and nearness to the pulpit and chancel.

The complaint further stated that the defendants have adopted a project for enlarging or altering the church by extending the same about twenty feet further north at the north end, and jutting out the sides of the new part so as to present the church when enlarged in the form of a cross, and with a large number of new pews between said pew No. 55 and the pulpit and chancel, which are to be removed some twenty to thirty feet farther from plaintiffs' pew and the pulpit placed on one side; that the defendants have entered upon said work, and have torn out the north end of the church, and are laying the foundation of the new part; that the plaintiffs have not consented to said enlargement, but have no objection to it, provided they can be set forward and have a clear title to a new pew corresponding in location relatively to the pulpit and chancel with their present pew; and thereupon the complainants prayed for an injunction to restrain the Vestry of St. Peter's Church from proceeding with the contemplated enlargement, unless and until they give satisfactory security that they will convey to the plaintiffs a new pew in the enlarged church, located at the same distance and in the same direction from the pulpit and chancel as their present pew.

The defendants showed by affidavits that the plan of enlargement referred to was the most judicious, and was demanded by the wants of the society, and approved by a majority of the owners of pews and attendants upon the church service.

Parliament Bronson, in person, for plaintiffs. The plaintiffs have a legal interest in their pew as a qualified real estate, and the defendants have no right or authority to do what they are now attempting, and thereby impair the pleasantness of the pew or depreciate its value without the consent of the plaintiffs. 5 Eng. Eccl. Rep. 251; 3 Ib. 19, 20; 12 Coke's Rep. 105; *Shaw v. Beveridge*, 3 Hill, 26; 16 Wendell, 28; 9 J. R. 147-156; 10 J. R. 217; 5 Cowen, 494; 3 Paige, 296; 7 Paige, 281; *Heeney v. St. Peter's Church*, 2 Edwards, 608; 3 Edwards, 155; 7 Paige, 77; 3 R. S. 292; 13 Mass. 430; 10 Ib. 323; 5 Metcalf, 127; 7 Pick. 138; 24 Pick. 437; 5 Barn. & Ald. 356; 1 J. C. R. 611; 5 J. C. R. 101.

Samuel Blatchford and *Stephen A. Goodwin*, for defendants.

I. The plaintiffs, *Parliament Bronson* and wife, have no interest in the suit. *Siglar v. Van Riper*, 10 Wendell, 414, and cases cited; *Wood v. Clute*, 1 Sandford, 199.

II. The material facts in the complaint are charged on information and belief only. There is no averment that pew No. 55 will be injured by the defendants' enlargement. An injunction is merely asked for by the prayer to force a compromise. 1 Barbour's Ch. Prac. 617; *Osborn v. Taylor*, 5 Paige, 515; *Kyle v. The Auburn and Rochester Railroad Company*, *Saratoga Sentinel*, 1841-2, p. 86, 87.

III. The plaintiffs seek by an indirect mode to compel the defend-

N. Y. Supreme Court.—Bronson and others v. St. Peter's Church.

ants to convey to them a new pew, but do not offer a release of pew No. 55, and could not do so if they would, inasmuch as the infant's interest cannot be released. 2 R. S., 194.

IV. The defendants are vested with full power to make the proposed alterations in their church edifice without the consent of the owner of pew No. 55, and the owner has no claim to compensation therefor. The plaintiffs acquired by their deed only the right to the use of the pew during divine service, and that is in subordination to the legal and statutory rights of the trustees. Webster's Ed. Laws of N. Y., Vol. 1, p. 336, sec. 1, 2, 3, 4; 2 R. L. 212; 3 R. S. 206, 2d ed; 3 Kent's Com. 402; *Freligh v. Platt*, 5 Cowen, 494; *Baptist Church v. Witherell*, 3 Paige, 302; *First Baptist Church v. Bigelow*, 16 Wendell, 28; *Heeney v. St. Peter's Church*, 2 Edwards, 608; *In the matter of the Brick Presbyterian Church in New-York*, 3 Edwards, 155; *Shaw v. Beveridge*, 3 Hill N. Y. R. 26; *Wentworth v. The First Parish in Canton*, 3 Pickering, 344; *Gay v. Baker*, 17 Mass. R. 435; *Howard v. Parish of Bridgewater*, 7 Pickering, 137; *Fasset v. First Parish in Boylston*, 19 Pickering, 362; *The People v. Runkel*, 9 J. R. 147; *Green v. Cady*, 9 Wendell, 414; *The Dutch Church in Garden Street v. Mott*, 7 Paige, 77; 3 Kent's Com. 419; *Stocks v. Booth*, 1 T. R. 428; *Tuttersalls v. Knight*, 1 Phillimore 237; *Fuller v. Lane*, 2 Add. R. 426; *Walter v. Gunner*, 1 Haggard, 321; *Parlington Rector, &c., of Parish of Barnes*, 2 Lee's R. 345; *Pitman v. Bridger*, 1 Phillimore, 324; *Blake v. Osborn*, 3 Haggard, 733; *Sayre's R. 177*, Report to Trinity Church Vestry, by Gulian C. Verplanck and others, 1847.

MAYNARD, J.—Parliament Bronson and wife have no interest in the subject matter of the action or the relief sought, which will authorize the Court to consider them parties. Mrs. Bronson's dower in the pew in question has not been assigned. She has therefore no right of possession, but a mere right in action. This however will have no influence upon the motion, so far as the interest of the infant plaintiff is affected.

I. I propose first, to look at the strict legal rights of the parties, and to ascertain what right each party has. The trustees of the religious corporation called *St. Peter's Church* in Auburn, in 1833, by deed executed under their corporate seal, "granted and sold" to George H. Wood, his heirs and assigns, forever, pew No. 55, in the said church; for the consideration of two hundred and twenty-five dollars [then paid.] George H. Wood is since deceased, and the infant plaintiff, Georgiana, is his only heir at law. This is the plaintiffs' legal title. It will be seen that the conveyance of the pew to Wood, the intestate, is upon its face, and according to the strict legal import of its language, a conveyance in fee simple absolute. But it is not claimed as conveying such an estate, but only operating by way of lease of the pew for the purpose of occupancy during divine worship, in accordance with the powers given to the trustees by statute. As a conveyance in fee this deed would be void, because the trustees had no power to grant such an estate; they could only "demise, lease

N. Y. Supreme Court.—*Bronson and others v. St. Peter's Church.*

and improve the same," &c., and have no power to regulate and order the renting the pews in their churches and meeting houses, &c. 3 R. S., 1st ed., 295, 6, section 4.

The plaintiffs' ancestor could have acquired no right whatever to the pew, but for the benign doctrine of the common law, of carrying out and giving effect to the intention of the parties so far as that intent is consistent with the rules of law, or by applying the doctrine of *cypres* to give effect to the intention of parties as near as possible and not violate the rules of law. Accordingly, although the grantee of the pew did not acquire the absolute property therein, yet he has such a possession that he can maintain trespass against an intruder. 3 Hill, 26. But this right of possession in the pew-holders, is "*in subordination to the more general right of the trustees in the soil and freehold.*" Id. 5 Cow., 496, per Woodworth, J. But it is an interest in real estate. 16 Wend., 28. The pew-holders can only enter the church by permission of the trustees, (who have power to close the church,) and for the purpose of religious worship: *People v. Runkel*, 9 J. R., 147, 156. A reference to the above cases and also to the case of *Heeney v. St. Peter's Church*, 2 Edw., 608, and following out the principles contained in them, would seem to settle and limit the plaintiffs' legal rights. But the counsel for the plaintiff makes a much broader claim: 1st, by reason of the large price paid for the pew: 2d, that the sale of the pew and price paid, were in expectation that the relative location of the internal parts of the church, (so far at least as respects the pew in question,) should not be altered. The plaintiffs certainly cannot have acquired any greater legal right by reason of the enhanced price of the pew, for there was a fair *quid pro quo*, and the plaintiff's ancestor acquired precisely what he bargained for, (like every other pew holder,) and no more.

The deed of conveyance for this pew is a contract *executed*; it contains no covenants to be performed in future; there is no stipulation that the church shall remain unaltered unless damages be paid or secured, nor have the trustees relinquished any of the rights and duties devolved upon them by statute: nor indeed have they the power to do so if they would. The purchaser then held the pew in subordination to the general rights of the trustees, without any stipulation, covenant or agreement whatever on their part to do, or abstain from doing, any act within their powers as trustees; and the purchaser took his title whatever he had subject to the power of the trustees "to repair and alter their churches or meeting houses, and to erect others if necessary:" 3 R. S., *supra*.

The repair and alteration contemplated, does not interfere with the plaintiff's pew, or with her possession of it. Every thing granted by the deed is still there and will remain in her possession as at present, without molestation. The plaintiff then has no legal right which the defendants are about to invade or take away, and if the value of the plaintiff's pew should be somewhat depreciated by the contemplated alteration (which is quite doubtful upon the proofs,) it is only the happening of an event which the lessee of the pew was

N. Y. Supreme Court.—Bronson and others v. St. Peter's Church.

bound to foresee, and for which he has no more reason to complain, than the purchaser of a city lot would have, because the surrounding proprietors should choose to exercise their legal right to remove their buildings, thereby rendering the purchaser's lot less desirable and of depreciated value. He has purchased subject to all such contingencies.

II. Let us next consider the equitable rights of the parties, for although the trustees have the absolute legal estate in the church edifice, and a strict *legal* right to make alterations, still they are *trustees*, and as such are bound to exercise their legal powers in a reasonable manner, for the benefit of the members of their church, congregation or religious society, who are their *cestuis que trust*; that is they are bound like other trustees so to perform their trusts and duties, so as to conduce to the benefit of their *cestuis que trust*, doing as little injury to them, and every of them, as may be.

As to this branch of the case, however, there is very little for the court to consider. The affidavits on the part of the defendants and the admission of the plaintiff's counsel show that the contemplated alteration will be a proper and judicious improvement, necessary and beneficial to members of the society, and in accordance with the wishes of a majority of the pew owners in the church. This certainly ought to settle the question as to any equitable claim on the part of the plaintiff to invoke the aid of this Court by way of injunction. The motion for injunction is therefore denied.

N. Y. Superior Court.

[*In Equity.*]

Before Justices DUER, MASON and CAMPBELL.

JUBEZ M. WOODWARD v. ARNOLD HARRIS and WILLIAM H. ASPINWALL.—*October Term, 1849.*

Where, in a bill for specific performance, it appeared that H. assigned to W. the government contract for the Panama and Oregon mail, previous to assignment to A.—Held on demurrer, that unless it appeared that the government had assented to such assignment, the court could not enforce such a contract.

It appearing that other parties had become interested as principals or sureties, whose rights would be prejudiced, the demurrer was therefore allowed with costs.

THE facts of the case sufficiently appear in the opinion.

E. Kimball, for complainant.

B. F. Butler, for defendants.

By the Court, CAMPBELL, J.—In March, 1847, Congress passed an

N. Y. Superior Court.—Woodward v. Harris and Aspinwall.

act, by which certain proposals which had previously been made for carrying the United States mail between New-York and Liverpool, and New-York and New-Orleans, by way of Havana, were accepted, and contracts were authorized to be made to carry into effect the purposes of the government. We shall have occasion to allude hereafter, in the course of this opinion, to the various provisions of this act, and to what was manifestly the intention of Congress in its passage. By the 5th section of the act, the secretary of the navy was directed to make a contract for carrying the mail, between Panama and some port in the territory of Oregon. In the performance of that duty, the navy department advertised for proposals, and among the persons offering to make a contract for this service was the defendant Harris. On the 4th of July, 1847, Harris entered into an agreement at the city of Washington, with the complainant, which after reciting that it was understood that the proposals of Harris would be accepted, provides that upon certain conditions and for certain considerations therein expressed, Harris should assign the contract, when executed, to Woodward, the complainant. This agreement for the 4th of July, was signed by Harris alone. The bill in this case was filed to enforce a specific performance of this agreement; after setting forth the agreement and the proposals of the Navy Department, it charges that the defendant, Harris, after entering into the contract with the government, assigned such contract to the other defendant, Aspinwall, in violation of the previous agreement with the complainant, and that the defendant Aspinwall, received such assignment with the knowledge of such previous agreement.

To this bill, separate demurrers were interposed by the defendants, and several grounds of demurrer were stated, which we shall proceed to consider. They may, however, we think, be arranged under three heads. 1st. The agreement having been signed by Harris alone, cannot be enforced, as there is no mutuality; and 2d, if there was mutuality, yet this contract with the government, even though its assignment may not be contrary to public policy, is of such a character, that a specific performance of an agreement for its assignment cannot be enforced, unless a previous express assent of the government to such assignment had been first obtained; and that the bill does not charge, nor is it pretended that the government had agreed or expressed in any way their willingness to give such assent; and lastly, that at the time of the filing of the bill, the contract had been assigned to the defendant Aspinwall, with the assent of the government, and that other persons who are not parties in this suit, had become interested, either as sureties or otherwise, and whose rights would be prejudiced if a specific performance should now be enforced.

This cause was twice argued before us with great ability, and we have given to the questions which we were called upon to consider, that careful reflection, which is due alike to their interesting character and to the magnitude of the interest involved in their final decision.

At common law, every contract for the sale of an article, where there was no actual transfer, was treated as a personal contract or covenant,

and there was no redress for its breach save in damages, thus allowing the party sought to be charged, the alternative of withholding the specific article bargained for or compensating in damages at his own election. Courts of equity deeming such a course inadequate for the purposes of justice, have interfered and required the offending party to perform strictly his covenants and to yield up specifically the article which he could not withhold without injury or fraud. 2 Story's Equity, § 714. "Specific performances were early enforced, especially of contracts relating to land, though from time to time doubts were expressed as to those relating alone to personal estate. But notwithstanding this distinction between personal contracts for goods and contracts for lands, is to be found laid down in the books as a general rule, yet there are many cases to be found where specific performance of contracts relating to personalty, have been enforced in chancery, and courts will only weigh with greater nicety contracts of this description than such as relate to lands." *Mechanics' Bank of Alexandria v. Seaton*, 1 Peters, 299. It was objected, however, that even if courts would decree specific performance of contracts relating to personal estate, that power of the court could not be invoked in this case, because the agreement was not mutual being signed only by the defendant Harris.

It is true, that in *Benedict v. Lynch*, 1 Johns. Chancery, 376, Chancellor Kent remarked, "That it had been ruled in several cases, that a bill for a specific performance will not be sustained, if the remedy be not mutual, or where one party only is bound by the agreement," and he quotes the dictum of Lord Redesdale, so often referred to in *Lawrenson v. Butler*, 1 Schoale & Lefroy, 13. It is to be remarked, however, that the Chancellor observed in *Benedict v. Lynch*, that the decision could be placed with more satisfaction upon the intrinsic merits of the case, and indeed, it appears to have been so placed. That decision was made in 1815. The question afterwards arose in 1817, in the court of errors, in the case of *Clason v. Bailey*, 14 Johns. Rep. 484, and was there discussed by the same learned chancellor at length, and with his usual distinguished ability and learning, and he refers to and comments upon the various cases which had been decided in the English courts of law and equity. Though still entertaining his original opinion and remarking that the weight of argument was in favor of the construction, that the agreement to be enforced in equity should be mutually binding, he says, there is nothing to disturb the strong and united current of authority on the other side, except the observation of Lord Redesdale, in *Lawrenson v. Butler*, and he concludes his remarks upon this branch of the case by saying, "the remedy, therefore, in such cases is not mutual. But notwithstanding this objection, it appears from the review of the cases, that the point is too well settled to be now questioned." The language of the Vice-Chancellor in the matter of *Hunter*, 1 Edwards' Rep. 1, is also explicit. "The court may, therefore, in a proper case, where there is a covenant on one side and no mutuality, decree a performance." This doctrine was again re-affirmed in the case of *McCrea*

v. *Piermont*, 16 Wendell, 460, and several of the decisions heretofore referred to, are quoted and approved.

In the case of *Flight v. Bolland*, 4 Russel, 298, a bill was filed by an infant for specific performance and it was dismissed by the master of the rolls for want of mutuality, that is, that a specific performance could not be enforced against an infant, and hence should not be enforced in his favor. But he adds, "The plaintiff's counsel principally rely upon a supposed analogy afforded by cases under the statute of frauds, where the plaintiff may obtain a decree for specific performance of a contract signed by the defendant, although not signed by the plaintiff. It must be admitted that such now is the settled rule of the court, although seriously questioned by Lord Redesdale, upon the ground of want of mutuality," and he adds, "that these cases are supported, because the statute of frauds only requires the agreement to be signed by the party to be charged, and that the filing of the bill renders the agreement mutual." In *Adderly v. Dixon*, 1 Simons and Stuart, 607, a bill was filed by the vendor of certain debts due to a bankrupt's estate, and the Vice-Chancellor says, "courts of equity decree the specific performance of contracts, not upon any distinction between realty and personalty, but because damages at law may not in the particular case afford a complete remedy," and in the same case he adds, "It is true, that the present bill is not filed by the purchaser, but by the vendor, who seeks not the uncertain dividends, but the certain sum to be paid for them." It has, however, been settled by repeated decisions, that the remedy in equity must be mutual, and that where a bill will lie for the purchaser, it will also lie for the vendor." In other words, where a contract is executed by both parties, if one party could file a bill for a specific performance, the court will also allow the other party to file his bill, and will not put him to his action at law. There must be something to be done by each party. The agreement must be made by parties competent to contract. It must be mutual in its general scope and objects. In the language of Lord Hardwick, in *Buxton v. Lester*, 3 Atkyns, 383, the agreement should be certain, fair and just in all its parts, and it should also be signed by the party sought to be charged. Courts of equity have not hesitated to enforce specific performance of agreements possessing these attributes, whether relating to lands or personal estate, and the decisions in England and our own country from the time of the decision in *Buxton v. Lister*, in 1746, to the present time, have flowed on in one almost uniform and strong current. The objection in this case, that this contract is not signed by the complainant Woodward, and cannot, therefore, be enforced, because it is not in that respect mutual, we consider not well taken; and if that was the only objection, we might and perhaps ought, to decree a specific performance.

We come now to the consideration of the act of Congress of March, 1847. Its provisions are various, though one object is apparent throughout, and for its attainment the act was passed. That object was the formation and building up a more extensive and powerful

navy, especially in steam vessels of war, and in steam vessels capable of being easily converted into vessels of war. Its first section provides for the building by the government of four steam vessels of war. In other sections contracts are authorized which would insure the building by private persons of eight more steam vessels, each of which were to carry a certain number of midshipmen of the navy of the United States, and a portion of which were to be commanded by officers of the same navy. The 5th and 6th sections are as follows.

Sec. 5. And be it further enacted, that it shall be the duty of the Secretary of the Navy to contract on behalf of the government of the United States for the transportation of the mail from Panama to such port as he may select in the territory of Oregon, once a month each way, so as to connect with the mail from Havana to Chagres, across the Isthmus, said mail to be transported in either steam or sailing vessels, as shall be deemed most practicable and expedient.

Sec. 6. And be it further enacted, that it shall be the duty of the Secretary of the Navy, to provide in the contracts authorized by this act, that the Navy Department shall, at all times, exercise control over said steamships, and at any time have the right to take them for the exclusive use and service of the United States, and to direct such changes in their machinery and internal arrangements as the Secretary of the Navy may require—due provisions being made in the said contracts for the mode of ascertaining the proper compensation to the contractors thereof.

It was under the § 5 of this act, that the contract was made with the defendant Harris. The bill charges that the contract made with Harris, was assigned by him to the defendant Aspinwall, and as it is notorious that the steamships of the latter are now running from Panama to California and Oregon, carrying the mail of the United States, we must infer that the proposals made by Harris, were for carrying the mail in steamships and not in sailing vessels, and indeed it appears by the agreement that such was the proposal, though the vessels are called in such agreement steamboats.

The § 6 of the act would then apply to these steamships. The navy department, by the terms of the contract, must be authorized at all times to exercise control over said steamships, and to have the right to take them for the use of the United States, and to direct changes in their machinery and internal arrangements, &c. The business of the contractor, as was well observed on the argument, is quasi official. It is not a mere mail contract, in which the only question which might arise, would be whether the mail should be carried on horseback, or in a four-horse coach. But it was a contract whereby the contractor, for a large consideration paid or to be paid by the government, was not only to transport the mail upon distant seas, but was also to furnish the government with the ready means of organizing an efficient steam navy for the protection of the commerce of the republic, and of her citizens settled on the shores of the Pacific. Hence, in the advertisement of the Secretary of the

Navy, he reserves to himself the right to select the proposals which he may prefer. He would not agree to accept the lowest bid. He might wish to look to the man who made the proposals to the sureties which he offered, and judging from character and condition whether he had the requisite skill and ability to carry out the project—in short, whether he would be likely to prove a useful and efficient auxiliary to the government in executing a new and expensive enterprise. Looking at the provisions of this act, and to the objects sought to be attained, and to the advertisement of the navy department, we do not think that the agreement for the assignment of the contract is such an agreement as this court, in the exercise of a prudent and careful discretion, could be called upon to enforce specifically, unless it appeared that the sanction of the government to such assignment had been previously obtained. This is not alleged or pretended; nor is it alleged that it would have been given, had not the assignment been made to Aspinwall. The bill shows that the assignment was made to Aspinwall, and as may be fairly inferred from the allegations contained in the bill, with the knowledge and approbation of the navy department.

There remains one other objection, which was urged against a decree for a specific performance, and that is, that the parties in interest have changed since the agreement was made between Woodward and Harris, and other persons have become interested who were known to the complainant at the time of filing his bill and who were not made parties thereto. The bill alleges that Edgar Howland, the partner of Aspinwall, became, with Aspinwall, one of the sureties for Harris to the government, immediately preceding the assignment of the contract by Harris to Aspinwall. We must infer that Mr. Howland became such surety, because it was agreed and understood that the contract was to be assigned to his partner, and relying upon the skill and ability of that partner to protect him as surety from loss. The amount of the bond appears to have been one hundred thousand dollars, and as the expenditures would necessarily amount to many hundreds of thousands of dollars, and the contract was to continue for several years, it may well be assumed that Mr. Howland would not enter into the obligations of a surety without the most ample protection in his own judgment either in the ability and integrity or superior skill of the principal. The bill now seeks to compel Aspinwall to assign to the complainant the contract assigned to him by Harris, and contains a general offer to indemnify Mr. Howland against his liability as surety. We are clearly of opinion that Mr. Howland would not be thus compelled to remain as surety under circumstances entirely different from those which existed when he signed the bond. There is no allegation in the bill that Howland had any knowledge or information when he signed the bond that there was any such agreement as is set up in the complainant's bill.

We must allow the demurrers, and as we are of opinion that a specific performance of the agreement set up ought not to be enforced without the direct sanction of the government, and no such sanction

N. Y. Supreme Court.—*Mier v. Cartledge and Ferguson.*

being shown or pretended, we cannot retain the bill for the purpose of allowing the complainants to seek through these proceedings compensation in damages. The demurrers must be allowed with costs.

New-York Supreme Court.

[*October Special Term, 1849.*]

Before Mr. Justice EDMONDS.

HENRY MIER V. CARTLEDGE AND FERGUSON.

Although it is a settled rule that a pleading will not be stricken out on motion as false, where it is verified by the oath of the party according to the rules and practice of the court, (because the court will not try the matter upon affidavits. 1 *Hill*, 370.) Yet, where the court can plainly see, from the pleading, that a new and equivocal formula, and unaccustomed words are averred, instead of the usual and proper language, to form an issue, by which it is quite clear that a real issue upon the facts is not produced, and evidently was not intended, it is a duty to hold such a pleading not within the rule.

THE complaint was on two drafts on and accepted by the defendants.

The defendant, Ferguson, pleaded that "he denies that the defendants in said complaint mentioned did, as therein alleged, accept the drafts in said complaint mentioned, or either of them," which was verified as required by the code.

C. Edwards, for plaintiff, moved to strike out the answer as a sham defence on affidavits which set out that the drafts had been accepted by the defendant's agent for debts owing by the defendants to the plaintiff; that after they had been dishonored, the defendants had repeatedly promised the plaintiff's agents to settle the matter of the drafts, never intimating a question as to their liability on them, and had three several times written to the plaintiff in England, where he resides, recognizing their liability, expressing regrets that they had been obliged to permit their acceptances to be dishonored, proposing terms of payment, and asking for indulgence, and uttering threats in case they were coerced.

E. Paine, for defendants, read no affidavits, but relied upon the fact that the answer had been verified, and that it amounted to the general issue which had never been stricken out as a false plea.

EDMONDS, Justice.—The practice of striking out a plea as false, has for some time prevailed in this court, and is founded on the same considerations which lay at the foundation of the practice of striking out frivolous pleas: the delay, namely, which was generally the ob-

N. Y. Supreme Court.—*Mier v. Cartledge and Ferguson.*

ject of such a mode of pleading, and which it is the duty of the court to guard against.

But there have been two exceptions to the rule ; one was that of the general issue, and the other that of a plea when verified by the oath of the party. The former exception is not now applicable, because under the code of practice we no longer have any general issue. But the latter, I apprehend, is still applicable.

The court have held that when a plea was verified under the rules adopted pursuant to the act of 1840, to wit, that "the defendant believes it to be true in substance and matter of fact," it could not be stricken out as false, because the court could not try the matter upon affidavits. *Maury v. Van Arnum*, 1 Hill R., 370.

Such pleadings are now to be verified more strongly than was required by the rules of 1840, and accordingly the answer in this case is verified by the defendants' oath, that "it is true of his own knowledge."

The answer, however, is justly subject to some criticism. It does not say that the defendants did not accept the drafts, which is the true mode of pleading, according to all well established rules, but it says that the defendant denies that the drafts were accepted, &c., so that when the verification says that the answer is true of defendant's own knowledge, it may mean that the fact which is thus sworn to be true is the fact that defendant denies the acceptance, and not the fact that the drafts were not accepted.

Again, the answer denies that they were accepted, "as in the complaint alleged." The complaint alleges that they were accepted by the defendants, and the affidavits show that they were accepted by their authorized agent. Such a mode of declaring is right enough, and the plaintiff may sustain his averment by proof of an acceptance by an agent. Yet the answer is so expressed, especially when taken in connection with the affidavit, as to mean merely to deny that the defendants personally themselves accepted. So that the answer and verification may be true, and yet the defendants be bound beyond all question, as acceptors of the drafts.

If the answer had pursued in this respect the usual and proper language, instead of adopting a new and somewhat equivocal formula, and in accustomed words, had averred that the defendants did not accept in manner and form, &c., then the verification would have brought this case within the exception, and placed the court in the position that it ought not to settle the question of the truth or falsehood of the answer on affidavits. But it has used language which may convey an idea quite different from that precise one which could alone have that effect.

I fully accord with the sentiments uttered by this court on a former occasion, *Broome County Bank v. Lewis*, 18 Wend., 566, that the propriety of exercising this power (that, namely, of striking out sham and false pleas) is manifest from the consideration that it is unbecoming the dignity of courts of law, unfit and improper in itself, and un-

◆

just to other suitors that courts should be compelled to examine and decide questions which have no foundation in the facts of the case, and that it would be a reproach to the administration of justice, if delays could be procured by what may properly be denominated frauds upon the right of pleading, and I am therefore disposed to be strict in examining pleadings where there is ground to suspect that a defence is put in for delay rather than for the legitimate purpose of procuring a judicial determination.

In this case, though the defendant is put upon his guard by the affidavits which have been served upon him, and his attention has thus been called to the allegation that his answer is false, and a sham, and to the facts by which that allegation is sought to be established, yet he has made no answer whatever, has made no explanation of the facts alleged against his good faith, and has manifested none of that anxiety which is so natural where one has an actual defence, and is possessed of a sincere desire to have it properly presented to the court. In three of their letters to the plaintiff, the defendants never intimated any objection to the claim which the plaintiff set up, upon these drafts. In one of them, they express their regret that their acceptance came back, and apologize for it. This was after the first one, and before the second one became due, and they promise to remit as soon as possible, and attempt to quiet the plaintiff by an assurance that he will get full interest on his claim. In their second letter they promise to secure the plaintiff's debt, and possibly make payment in good business paper, and in one of them they threaten those who shall place themselves in a hostile attitude and boast that they never fight but they win!

If these letters relate to any other transactions than these drafts, it was indeed very easy for the defendants to explain them away. They have had the opportunity and remain silent. The inference from that silence is very strong, and when it is considered that the first of the letters speaks in terms of the acceptance, and the last one was handed to the plaintiff's agent as their answer to a demand by him for the payment of the drafts, it becomes quite irresistible that they have no defence in fact.

When to this are added the facts that the plaintiff's agent called on defendants for payment of these drafts in July, 1848, and several times between that and the 13th September following, and again in March, April and May, 1849, and had conversations with them in regard to them, in none of which did they intimate any question as to their acceptance, but repeatedly promised a settlement, until they finally stopped payment, it appears to me that the conclusion against the bona fides of their answer is too strong to be disregarded.

Still I may be wrong in this inference, and the danger of that admonishes me that in this as well as in other like cases, the court ought to be very cautious in exercising the power of depriving a party of all opportunity of making a defence against a claim upon him.

While therefore I am constrained by the aspect in which this case presents itself to me, to hold that the defence set up in the answer is

House of Lords—Rowley and others v. Adams and others.

a sham defence, I am inclined to think that that ought to be without prejudice to the defendants' hereafter applying to the court for leave to put in an answer, when they can satisfy the court that they have a defence in fact and desire in good faith to avail themselves of it.

With this reservation the motion will be granted with costs.

SELECTIONS FROM RECENT ENGLISH DECISIONS.

House of Lords.

ROWLEY AND OTHERS V. ADAMS AND OTHERS.—*May 8, 22, 1848.*
July 27, 1849.

EXECUTORS—LOSS OF TESTATOR'S PROPERTY—LIABILITY.

Where it did not appear that a testator's surplus capital in a brewery carried on afterwards by his son, could have been realized without putting an end to the business, and the state of the assets and liabilities, was uncertain from the loss of the books of accounts, and the business proved insolvent and insufficient to pay two legacies, held that the executors were not personally liable.

THE testator, Henry Wyatt, a brewer in Portpool Lane, Gray's Inn Road, by his will, dated in 1826, gave his surplus capital in his business to the respondents, as his trustees and executors, in trust, to invest and pay the interest to his widow, and at her decease, he directed two sums of £12,000 to be set apart for his two daughters and their children. The trustees, however, at the testator's death, allowed the sons to carry on the business and the legacies were suffered to remain in their hands. An administration suit was afterwards instituted, upon differences arising between the sons, but was abandoned. In January, 1828, the partnership was dissolved, and the business subsequently sold. Upon its being found to be insolvent and insufficient to pay the legacies, this suit was instituted in 1831, to charge the executors personally. The Master of the Rolls had made an order for an account, but the Master was unable to take the accounts, by reason of the loss or destruction of the books of account; he had, however, found that the testator's surplus monies, besides his share in the capital in the brewery, exceeded the sum of £48,000, and also that the executors might, with due diligence, have possessed themselves of sufficient property to pay the legacies. The court, on excepting to the Master's Report, had held, that as the testator's surplus property could not have been realized without putting an end to the business, which the executors were not bound to do, and the state of the assets and liabilities were more matter of conjecture than proof, they were discharged from liability. Upon appeal to the Lord Chancellor, (Lyndhurst,) this order was affirmed, whereupon this appeal was presented.

House of Lords.—Smith v. Capon.

The Master of the Rolls read the judgment of the Lord Chancellor who was unable to attend, which, after stating the facts and reviewing the several proceedings in the cause, held that the executors were not liable.

LORD BROUGHAM having moved the judgment of the House, that the appeal be dismissed with costs, and Lord CAMPBELL and Lord LANGDALE, having concurred, the appeal was dismissed accordingly.

Before Vice-Chancellor WIGRAM.

SMITH v. CAPON.—*February 12, 13, 1849.*

DEMURRER.—ASSIGNMENT OF LEASE WITHOUT LESSOR'S CONSENT.

Where a lease contained a covenant not to assign, but no proviso for re-entry in case of assignment, and there was an assent by the lessor's solicitor, though not stated on the bill to be with his authority, a demurrer was overruled.

THE bill was filed for the specific performance of an agreement to purchase the lease of a house in Great Ormond-street. It appeared that the lease had been granted in March, 1845, by Lord Monteagle and Lady Lucy Standish, to Mr. Wakefield, and contained a covenant, on the part of the lessee, not to assign or underlet the premises without the license, in writing, of the lessors. It was also covenanted that such license, if granted, was not to extend to any future assignment or demise of the premises, nor to be construed as waiving the covenant restraining alienation, but that it should be limited to the persons named therein. Mr. Wakefield, by indenture, reciting that Lord Monteagle was the surviving lessor, and that he had assented, in writing, to the assignment, afterwards assigned the lease to the plaintiff, who had since agreed to assign it to the defendant, but without the assent of Lord Monteagle being actually obtained. It, however, appeared that, in answer to an inquiry by the defendant, his lordship's solicitor had stated that such assent was of course where the proposed tenant was a responsible one, and that it would be granted in the case of assigning to the defendant.

Schomberg, appeared in support of a demurrer to the bill, on the ground that the lease containing the covenant as aforesaid, the statement of the solicitor without an allegation of his authority so to state, was insufficient, and that the lessor's consent should have been actually obtained.

Wood and Southgate, contra.

Cur. ad. vult.

Court of Queen's Bench.—Gardner v. Slade.

THE VICE-CHANCELLOR said the question was, whether, upon the evidence proving the case as alledged by the bill, the defendant would be entitled at the hearing to have it dismissed, or whether the omission of an averment in the bill that the landlord's assent to the assignment had been obtained was fatal. It appeared that, although the original lease contained a covenant in restraint of assigning without consent no proviso for re-entry, or determining the lease, was shown in the case of assigning without consent. The assignment, therefore, appeared on the bill to be valid at law. The question was, whether there was such a breach of contract as would induce this court to compel the parties to take the title. Without giving any opinion on the omission of the averment of the landlord's right of re-entry, the plaintiff at the hearing would be entitled to a reference; the demurrer, therefore, must be overruled.

Court of Queen's Bench.

Before the Four Judges.

GARDNER V. SLADE.—14 June, 1849.

MASTER AND SERVANT—CHARACTER—SLANDER.

Held that an action for slander will not lie by a servant against a former master, where the words spoken have not been spoken maliciously, and the circumstances so stated only came to the master's knowledge after the character had been given; and held also, that it was immaterial, whether the communication was made at the time of giving the character or some time afterwards.

A RULE *nisi* had been obtained to set aside the verdict, and enter a nonsuit in this case, pursuant to leave reserved. The plaintiff was formerly in the service of the defendant, who had communicated certain circumstances regarding the plaintiff's character to her new master, whereupon this action was brought to recover damages for the alleged slander.

Petersdorff, against the rule.

Crowder, in support.

By the Court.—The law privileges a former master who spoke the truth regarding the character of a former servant, from liability. The communication might be made after the character had been given if the circumstances came to his knowledge afterwards, and there was no proof that it was made maliciously. The rule must therefore be absolute to enter the nonsuit.

A
DIGEST
OF THE
CASES REPORTED.

[For Index to the Principal Matters, see ante, p. v.]

ABATEMENT OF SUIT.

An action of ejectment, pending in the circuit court in the district of Vermont, does not abate by the death of the plaintiff before judgment, but his administrator may, under the provisions of 31st section of the judiciary act of 1789, become a party to the suit, and prosecute the same to final judgment. The *cause of action*, by the *local law*, surviving to the personal representative, and jurisdiction of the action having once vested, it continues, and may be exercised, notwithstanding the administrator may be a citizen of Vermont, residing in the same state with the defendant. *Hatfield v. Bushnell*, 331

ACT OF THE LEGISLATURE.

An act of the legislature, whether public or private, cannot be impeached in a court of law upon the ground that its passage was procured by means of fraudulent representations made to the legislature or by the concealment from that body of material facts.

An act of the legislature authorizing the land commissioners to release the interest of the state in escheated land to any citizen or resident alien, in certain cases, is an act appropriating public property to private purposes and requires a two third vote. The enabling act of 29th of April, 1833, is such an act, and having been passed by a majority vote is unconstitutional and void.

Letters patent granted by the commissioners under this act, are void upon their face, and it is not necessary to proceed by *scire facias* or by bill in equity to set them aside.

An act of the legislature removing the disability of alienage, and authorizing an heir to take, hold and dispose of land the same as if he had been a citizen at the time of the death of the owner, will entitle such heir to take as by descent, where the land has escheated to the state for want of heirs

capable of inheriting. *Englishbee v. Helmutth and Jenkins*, 186

ADMIRALTY.

Admiralty has jurisdiction of contracts for the transportation of passengers by sea, and which may be exercised both *in rem* and *in personam*.

The new Imprisonment Acts of the State of New-York, as adopted by the Acts of Congress of Feb 28, 1839, and Jan. 14, 1841, (5 Stat. U. S. 321, 410,) do not apply to process issued out of Courts of Admiralty.

The processes of these courts are subject to the regulation of the Supreme Court, by virtue of the Acts of Congress of May 8, 1792, c. 2.; and rules the Supreme Court adopted pursuant to those acts are authoritative and conclusive on the subject.

Rules 2 and 3 of the Supreme Court give parties the right to a warrant of arrest, and to the advantage of bail to satisfy the final decree rendered in a cause.

The respondent was properly held in custody if the libellant had a subsisting right of action.

The prospective operation of the act of 1841 is negatived in this respect by that of 1842.

Taking personal security for such demand by promissory note or bill of exchange, will be regarded a waiver of the remedy in Admiralty and bar proceedings, while such security remains outstanding.

Delivering up the security upon the hearing, is a sufficient compliance with the principles of law applicable to the case to prevent the respondent avoiding the action by a preliminary motion.

The jurisdiction of the Admiralty *in personam* in matters of contract, has no connection with the question of "lien." The party is proceeded against upon his personal liability by process of arrest or citation. *Marshall and others v. Bazin*, 342

In asking a discharge from a bail bond, in admiralty, the parties must place their claims

upon the same footing as if the relief sought was from a money bond.

The undertaking of bail is absolute and not conditional, and cannot be discharged by producing the principal in court. *Cure, Assignee of Town, v. Bullus*, 345

ALIEN.

An alien cannot acquire a title to real property by descent, or which is created by other mere operation of law, though an alien resident may purchase land or take it by devise subject to the right of the state to divest him. *Englishbee v. Helmuth and Jenkins*, 186

ARBITRATOR.

Where the subject matter of an action brought to recover a sum for attendance of a surgeon on the defendant's wife, was referred to an arbitrator: Held, that the arbitrator was bound to admit evidence to prove the unskillfulness of the plaintiff. *Rambalon v. Whalley*, 354

ASSIGNMENT OF ERRORS.

It is irregular to serve an assignment of errors before one is filed, and a default entered on the service of an assignment before filing one although more than eight days have expired since the filing and before the entry of the default, is a nullity. *Syme v. Ward*, 10

ATTORNEY.

Where plaintiff and defendant settle an action without paying the plaintiff's attorney's costs, but without any collusion to defraud the attorney, the court would not allow the attorney to proceed in the action for his costs. *Francis v. Webb*, 199

BETTING AND GAMING.

Under the 9th Section of the act to prevent betting and gaming, 1 R. S. 662, persons privately interested in a bet, by previous contributions, when the bet is in fact made by another, cannot sue to recover the money back; such action lies only by the person actually making the bet. *Hewe v. Hollister*, 11

BILL OF EXCHANGE.

Where a bill was presented to the defendant who was the drawer, as the executor of the acceptor, *semble*, no notice of dishonor is necessary, although notice is necessary and knowledge alone is insufficient. *Caunt v. Thompson*, 291

Where a bill of exchange was given for passage money, and proceedings were commenced by libel *in personam* in the U. S. Court, to recover the same, and the libellant

offered to surrender the bill: Held that the suit could be sustained.

The making a bill payable at a bankers is sufficient authority for them to honor it, and the acceptor ought to have given notice not to pay the bill if he had so intended. *Keymer v. Laurie*, 353

CARRIERS.

Where the defendants undertook to convey a horse, subject to the owner undertaking all risk as to the conveyance, and the horse was killed by reason of the insufficiency of the box in which he was placed:—Held, that the plaintiff could not recover in an action against the defendants as common carriers, whose duty it was to carry safely. *Shaw v. North and North Midland Railway*, 324

A railway company is bound, not only to convey luggage entrusted to their care to the railway station, but to deliver the same at the usual place of delivery—the edge of the platform. *Richards v. London, Brighton, and South Coast Railway Co.* 325

CHURCH PEW.

A woman on the decease of her husband acquires a right *in action* merely in a church pew, and her subsequent marriage gives her second husband no interest in the pew, prior to her dower being assigned to her in the pew owned by him.

The Vestry of Churches in communion with the Protestant Episcopal Church as Trustees under the Statute of New-York, have the legal right to alter the church edifice: Held, that the absolute deed of a church pew in perpetuity is only the conveyance of the right to the use of the pew during divine service in the nature of a leasehold estate, and gives the holder no claim that the relative situation of the internal parts of the church shall not be altered; nor that the church shall remain unaltered unless damages shall be paid or secured. *Bronson and wife and An'r v. St. Peter's Church*, 361

CODE PRACTICE AND PLEADING UNDER.

So far as suits that existed in the supreme court when the Code took effect are concerned, the provisions of the Code forbidding the allowing of costs on granting a motion, have no application to Court of Appeals. *Supp. to Code*, § 2.

If the suit had been commenced since the first of July, a defendant in error would have been obliged to have borne the expense of getting rid of the irregular proceeding of his adversary. *Syme v. Ward*, 10

Old pleadings subject to rules of code. *McCormick v. Graves*, 45

In a cause commenced before the code of procedure went into effect, execution cannot be

issued until thirty days after perfecting judgment. *Hutchinson et al. ads. Clark*, 91

Under the provisions of the code appeal can be taken to reverse a judgment by default entered by the Clerk of the Court. *Jones respondent, v. Kip, appellant*, 91

It is only in difficult or extraordinary cases that the court is authorized by § 263 of the Code, to make an allowance of the percentage in addition to costs. Where, therefore, a defendant put in his answer, but omitted to file an affidavit of merits: held, that the case was not of the character contemplated by the Code. *Hall v. Parker*, 138

An assignor of a thing in action is a competent witness, though it appear that the assignment was made for the purpose of making him a witness. *Hamilton and Deansville Plank Road Co. v. Rice*, 139

If a complaint does not show a cause of action it is demurrable; but it does not aid a defective answer.

Where, therefore, the complainant did not aver that the plaintiff was the owner of the promissory note, on which the action was brought and the defendant answered, but did not deny the plaintiff's title thereto:—*Held*, that the answer was bad.

On the trial, possession of a note would be presumptive evidence of title, and if a defendant deny it, he must either demur or set up such fact affirmatively in his answer.

It is not necessary in a complaint on a promissory note to state a consideration, especially where it appears that the payee has endorsed it, and put it in circulation. *Hoxie against Cushman and Ross*, 149

The plaintiff must state in his complaint facts necessary to prove at the trial to show a cause of action.

Costs are only allowed when there is a defect in substance in pleading. *Vanderpool, Jr. against Tarbox and Kingsley*, 150

On an appeal from a decision of a justice of the peace, the county judge has the power to grant an order extending the time for the respondent to make and serve the counter affidavit referred to in § 309 of the Code. *Truax, respondent, v. Clute, appellant*, 163

By the 249 and 252 sections of the Code, a judge has the power to order any property due to the debtor to be applied in satisfaction of the judgment. These sections, however, only apply to moneys actually due to the judgment debtor, and not to moneys to become due on a contingency, or on an executory contract not performed at the time of the examination. *McCormick v. Kehoe*, 184

The president of a bank, who was a large stockholder, gave evidence as a witness for the bank, in an action by the bank against a third person, to recover the amount of a promissory note claimed to be due to the bank. *Held*: that his testimony was improperly admitted. *The President of the Bank of Ithaca v. Bean and others*, 225

Where a judgment was affirmed upon appeal at the general term:—*Held*, that the costs prescribed by the 6th subdivision of the 307th section of the Code should be allowed.

Where a plaintiff had noticed his cause for argument at the Albany general term for the first Monday of March, and the defendant afterwards noticed it for the Saratoga general term to be held on the same day—It was held, that the plaintiff was not entitled to the costs for each of those terms. *Wilson, receiver, against Allen and others*, 286

The old rules of pleading are abrogated by the Code, and cannot, therefore, be applied to it. If the complaint or answer contain such a statement of facts as make out a case, it is enough, though it be informally done. *Tucker against Rushton*, 315

The rule which requires a statement of the cause of action, renders it necessary, in a suit for slander, to set forth the precise words used.

A defendant cannot justify under sections 163 and 164 of the Code, unless the slander is set forth in the complaint.

The omission to state the time and place of slander, is not a ground of demurrer; the court can order the pleading to be made definite by amendment.

A complaint need not be positive, it may be on information. § 167. *Finnerty against Barker*, 316

It is not sufficient in a demurrer to a complaint to say that the complaint does not show a good cause of action. The statement of the ground of demurrer should distinctly appear. *Hunter against Friebe*, 319

Where an objection is taken to a pleading, on the ground of irrelevant or redundant matter being inserted, it must be taken within the time limited by the Code for putting in an answer or a reply.

Where, therefore, it appeared that the time for the plaintiff to reply had been extended beyond the twenty days, and an application was afterwards made to strike out certain passages in the answer, as being redundant and irrelevant: *Held*, that the application was too late.

Expressions of opinion merely, and insinuations tending to throw discredit on the motives of a party, need not be replied to.

It is only material allegations, not controverted by the answer or reply, that are to be taken as true. *Isham, receiver, against Williamson and another*, 340

It is irregular to include costs in entering up judgment, without giving the two days' notice required by the Code; and if judgment be entered up without giving such notice, the court will order a relaxation with costs of motion, and require the plaintiff to strike out the costs from the record.

The irregularity in the entry of the costs does not, however, affect the regularity of the judgment. *Goldsmith against Merpe*, 350

Although it is a settled rule that a pleading will not be stricken out on motion as false, where it is verified by the oath of the party according to the rules and practice of the court, (because the court will not try the matter upon affidavits. 1 *Hill*, 370.) Yet, where the court can plainly see, from the pleading, that a new and equivocal formula, and unaccustomed words are averred, instead of the usual and proper language, to form an issue, by which it is quite clear that a real issue upon the facts is not produced, and evidently was not intended, it is a duty to hold such a pleading not within the rule. *Mier v. Cartledge and Ferguson*, 371

COLLISION.

Collision in Hell-Gate—collision occurring during day-time—proof as laid—defence, &c., &c. *Odell, libellant, v. Steam Boat Washington*, 4

Held, under the circumstances, that a steamboat was wrong in attempting to pass a propeller in a narrow and dangerous part of Hell-Gate.

That a steamboat was wrong in attempting to pass a propeller in Hell-Gate, being responsible for knowing that in so doing there would be great danger of a collision.

Held, to be no excuse for getting into a wrong position, where nothing could be done to prevent a collision, when that position was attained through negligence.

That any vessel would be held responsible for a collision which should occur in consequence of unnecessarily attempting to pass another struggling in the passage, there being no fault in the latter. *The Naugatuck Transportation Co. v. Steamboat Rhode Island*, 38

CONSTRUCTION.

Held, that the meaning of the expression "business purposes," in a letter containing a remittance of £100 for the same, was rightly left to the jury; as also, whether the plaintiff had wilfully disobeyed his instructions in appropriating a sum of £30 to the payment of his salary as clerk to defendant.

Held, also, that the amount of damages was in the discretion of the jury, and that as the judge who presided was satisfied with the verdict and the amount of damages, the court would not interfere with the finding of the jury. *Smith v. Thompson*, 327

COPYRIGHT.

Copyright in the works of a foreign author not published abroad. *Boosey v. Davison*, 231

A foreigner has no copyright in works published by him at common law or by statute, and the assignee of a foreigner, although a British subject, stands in the same position as the assignor. *Boosey v. Purday*, 356

CORPORATION.

A corporation has the right to institute and defend suits for the purpose of protecting its property and interests, and also for the purpose of protecting its corporate franchises and privileges, although no such right is expressly granted by its charter.

But this right can only be exercised in cases where the corporation is a party to the suit, or where, though not a party to the record, it is the real party in interest; as in defence of titles acquired from it, and which it is bound to defend, or in defence of persons acting by its authority, and in its behalf.

A corporation without any express power in its charter for that purpose, may make a promissory note, or bill of exchange, when not prohibited by law from doing so, provided that such note or bill is given in the course of its proper legitimate business.

But as the power to issue negotiable paper is only a special and conditional implied power, every person who takes such paper is charged with the knowledge that it is necessary as a condition precedent to its validity, that the debt which forms its consideration, should be contracted in the proper legitimate business of the corporation, and he will not be protected as a *bona fide* holder, without notice, although he had no actual knowledge that it was given for a purpose not authorized by the charter of the corporation. *Halstead v. The Mayor, &c., of New-York*, 74

COSTS.

The Supreme Court has power on granting a motion in a suit commenced before the first of July, to allow to the prevailing party his costs to be taxed. *Syme v. Ward*, 10

CREDITOR'S BILL.

An order should not be made upon a defendant in a creditor's bill to deliver property or money to a receiver unless it appears that the party has the power to obey the order. The failure of the party to show to whom he has paid money, which is proved to have been in his possession several months before the bill was filed, is not sufficient to warrant an order on him to pay the money to the receiver.

The answer of a party examined before a referee has the same effect as an answer to a bill when the oath of the party is required. In the assignment by a debtor under a creditor's bill, it is proper to insert an exception as to furniture exempt by law from execution, even in cases where the debtor has made a sale or assignment of all his furniture, which has been set aside as against creditors.

Where the determination of the issues of fact joined in a cause will not necessarily in-

volve the examination of a long account, a cause cannot be referred under the act of 12th April. 1848. *Sheldon and others v. Weeks and others*, 57

DEED.

Where a deed has been formally delivered, it is of no moment that the signature has not been affixed, as that is not necessary to give effect to a deed. *Cherry v. Henning and Needham*, 359

DESCENT.

The rule that a party to take by descent must have been entitled to take when the descent was cast, does not apply to a case where there are no heirs capable of inheriting at the death of the last owner and the land has consequently escheated to the people. The state cannot by a special act authorise an alien of nearer kin to take to the exclusion of a citizen of kin more remote, as it would be divesting a title acquired by an heir under the general law of inheritance but where there are no heirs who can be affected, and the property is in or must come to the people, the legislature have the power to authorise a party to take as by descent or in any other manner. *Englishbee v. Helmsuth and Jenkins*, 126

EVIDENCE.

In an action of *trespass de bonis*, where the defendant pleaded the general issue and gave notice of justification, and justified under a judgment and execution, and the plaintiff gave in evidence his discharge under the U. S. Bankrupt Act of 1841, obtained subsequent to the date of the judgment:—*Held*, the defendant might give in evidence that the plaintiff had been guilty of such acts of fraud as would by the bankrupt act avoid the discharge. *Ruckman, in Error, v. Cowell, in Error*, 7

Upon an issue as to the legitimacy of a child, the marriage of the parents may be proved by evidence of reputation, cohabitation, and acknowledgment of the parties.

But when there is proof of an actual marriage, and the issue is as to the legitimacy of the offspring of such marriage, a previous reputed and acknowledged marriage will not render the actual marriage illegal, and bastardize the issue of such marriage. *Clayton et al. v. Wendell et al.*, 77

A. preferred a charge of embezzlement against B., before a magistrate, the latter said, "Do you intend giving B. into custody for it?" A. replied, "I do give him into custody;" whereupon B., by an order of the officer of the court, went into the dock:—*Held*, that there was no evidence of A. having done more than call upon the magistrate to exercise his jurisdiction. *Brown v. Chapman*, 93

The plaintiff, a carrier, was entrusted by Y. to deliver good tea to A. and inferior tea to the defendant. By mistake, he delivered the good tea to the defendant, who appropriated it. The plaintiff paid Y. for the good tea, and applied to the defendant to re-deliver it, who said, "As you have made the mistake you must put up with the inconvenience," but subsequently he agreed to pay the plaintiff for the same, he, the defendant, had ordered of Y.:—*Held*, that this was evidence to support a count for goods sold and delivered by the plaintiff.

Affidavits cannot be used to supply alleged omissions in a judge's notes of evidence in a trial before him. *Coles v. Bulman*, 165
The plaintiff in an action of slander, for words spoken at an inquest on a fire, set out in the declaration, that the defendant had said that he entertained strong suspicion of some one having had a hand in the mysterious affair, and that the plaintiff was the person who had done it. It appearing from the evidence, that the plaintiff's name had not been mentioned: *Held*, a fatal variance, and the court refused to amend the declaration, but nonsuited the plaintiff. *Elliot v. Thompson*, 359

EXECUTOR, LIABILITY OF.

Where it did not appear that a testator's surplus capital in a brewery carried on afterwards by his son, could have been realized without putting an end to the business, and the state of the assets and liabilities, was uncertain from the loss of the books of accounts, and the business proved insolvent and insufficient to pay two legacies, held that the executors were not personally liable. *Rowley and others v. Adams and others*, 374

EXECUTION.

An execution may be issued against personal property alone.

If issued against both real and personal property in a county in which the judgment has not been docketed, the writ may be amended by striking out the clause as to real estate. *Stephenq et al. v. Bowning and another*, 61

FALSE IMPRISONMENT.

In an action for false imprisonment upon a charge of felony, the question of malice is for the jury, but the question of reasonable and probable cause is exclusively for the judge to determine. *Virtue v. Painter*, 358

FOUND CHATTEL.

Upon Error to the Exchequer Chamber; it was held that as the finding of a chattel under the circumstances, could not have been with any felonious intent to commit a larceny—the subsequent conversion was

free also from the same. *Regina v. Wood*, 291

FUGITIVE FROM SERVICE.

In a proceeding on habeas corpus under the Revised Statutes, the averment of a person claimed as a fugitive from service that he is a freeman, is a sufficient answer to the allegation by the claimant that such person is his slave.

In submitting proof of the claim to the alleged fugitive, the contemporaneous acts of the fugitive and the claimant during the period when the relation of master and slave is said to have existed between them may be shown by the claimant.

The general rule of evidence in regard to the proof of the laws of the various States of the Union, stated in *Greenleaf's Evidence*, § 489, has not been adopted by the courts of the State of New-York, and is not the rule therein, excepting so far as it is enacted by the act passed April 12, 1848, entitled "an Act relative to the proof of the Statute of Common Law of other States."

The provision of the New Code, that no person shall be excluded as a witness by reason of his interest in the event of the action does not extend to cases of habeas corpus.

A general understanding that the laws of any state tolerate slavery, do not exempt a judge from requiring lawful evidence thereof, and failing to give such evidence the claimant of an alleged fugitive fails to establish the main point in his case, issue having been joined thereon that the person was bound to him in service.

It being sufficiently proved that the alleged fugitive was bound in service to the claimant, yet, if the claimant, instead of removing him from the state without delay, has detained him in his own custody, that is a sufficient reason why the person is entitled to his discharge. There is only one case in which a fugitive slave can be kept by his master in his personal charge in this state and that is under the law of Congress, to take him without delay before the proper authority, in order to obtain the certificate necessary for his removal from the state. When it appears that the claimant holds his slave in this state, not for the purposes contemplated in the act of Congress, but that he holds him as his slave because he owes him servitude, it is the duty of the judge to order him to be discharged from custody. *In the matter of Belt, an alleged fugitive from service from the State of Maryland*, 80

In this state all are presumptively free men, of whatever color.

The arrest, detention and concealment, without legal process, of a colored person, on pretence that he is a fugitive slave, establish a strong *prima facie* case against the party committing such violence, of felonious intent under the statute against kidnapping, and justify the conclusion, that an illegal

disposition is designed to be made of him. It is made the duty of even private persons, to arrest any one in the act of committing a felony, and a charge of assault and battery and false imprisonment brought against officers for arresting a party under such circumstances, without warrant, will be dismissed. *The People on the Complaint of Clayton v. Wolven and Hulse*, 89

HABEAS CORPUS.

On habeas corpus, how far the court or officer granting it, are bound by the return, or may go behind it. *The People v. Marlin*, 49

HOMICIDE.

Whether a homicide was justifiable under the statutes is to be determined by the jury from their conviction whether there was reasonable ground for the accused to apprehend great personal injury, and not from the fact that the accused did in fact entertain such apprehension.

Whether a homicide is excusable or not, must depend in a great measure upon the nature of the weapon used and the manner in which it was used. *The People v. Austin*, 117

HUSBAND AND WIFE.

Letters and a power of attorney from a husband to a wife, do not constitute such a lien for money supplied to her, not being for necessities, nor to pay creditors, as to give a court of equity jurisdiction to interfere. *May v. Skey*, 195

INDICTMENT.

Where an indictment contains several counts charging the same offence in different forms, the prosecution will not be compelled to elect on which count they ask a conviction. *The People v. Austin*, 117

INFANT.

An infant is not liable for money had and received, though applied for the purpose of procuring necessities.

In an action against husband and wife, the ratification by the husband, after marriage, of the promise of his wife made during infancy, *dum sola*, is not a good answer to a plea of the wife's infancy.

To a replication of necessities, to a plea of infancy, it is not a good rejoinder that the infant was under the care of a guardian, who was willing and able to provide, and did provide necessities for the infant. *Smith v. Oliphant and others*, 17

INJUNCTION.

Injunction restraining the publication of a catalogue of unpublished etchings, on the

common law right of property, and on a breach of trust in obtaining the information. *Prince Albert v. Strange*, 328
Where a verdict on a trial at law has been given in favor of the patentee, an injunction will be granted, although a bill of exceptions has been tendered. *Bridson v. Benaks and others*, 322

INNKEEPER

An innkeeper is not bound to inquire whether a carriage brought by a guest is his property or not, and has a lien on it, though it should turn out to have been hired. *Turrill v. Crawley*, 230

LESSOR AND LESSEE.

A covenant in a sub-lease to indemnify the sub-lessor against the breach of covenants in the original lease, held to be unequalled, and not restricted by non-occupation. *Croafeld v. Morison*, 199
Where a lease contained a covenant not to assign, but no proviso for re-entry in case of assignment, and there was an assent by the lessor's solicitor, though not stated on the bill to be with his authority, a demurrer was overruled. *Smith v. Capon*, 375

LIBEL.

In an action for libel, which imputed to the plaintiff, a surgeon, unprofessional conduct, whereby he had rendered himself liable to be expelled the college under its by-laws:—*Held*, that the proof of the existence of the by-law was material, and that it was not enough that it was alleged in the libel. *Wakley, jr. v. Healey and another*, 357

LIEN.

In order to entitle a trainer to a lien on race-horses for their keep and training, he must show that he is entitled to their exclusive possession. *Forth v. Simpson*, 353

MARRIAGE SETTLEMENT.

Assignment of a fund to trustees under a marriage settlement, held upon construction of the settlement to give children of marriage vested interests as they attained twenty-one and to their representatives if dead. *Gordon v. Hope*, 323

MURDER.

Any killing without a design to effect death, unless it is justifiable or excusable, is manslaughter only.
Implied malice, constituting killing without an intention to kill or murder, is not recognised in our law.
Recent provocation, and the fact that the passions have not had time to cool, do not, under

our statute, mitigate a killing with a design to effect death, from murder to manslaughter. Such killing is murder, whether the design to effect death was formed on the instant or had been previously entertained.
The intention to take life constitutes, under our statute, the main distinction between murder and manslaughter. *The People v. Austin*, 117

NEW TRIAL.

A party applying for a new trial on the ground of surprise, must show that he has used reasonable diligence in making his motion. *Snowhill and others adn. Knapp*, 15

NON-RESIDENT.

The jurisdiction of the Superior Court does not extend beyond the limits of the city and county of New-York. *Blossoms against Adams*, 314
To authorize the arrest of a defendant, it must appear by the affidavit, that he is a non-resident, or is about to remove from the state. That he is going to California is not sufficient. It must appear by the affidavit that he is going with an intent to take up his residence there. If it is shown that the intent to remove was not with the view of changing his place of residence the order for arrest will be revoked. *Brophy v. Rodgers*, 152

PARTIES.

Where the plaintiff, in a suit in partition, makes persons defendants who have no interest in the subject matter of the suit, their costs of defending will not be charged upon the fund, or against their co-defendants, but must be paid by the plaintiff personally.
The rule is otherwise, however, if such unnecessary parties are brought in at the request of, or on account of, the other defendants. *Hammersley v. Hammersley and others*, 127

PATENT.

In the construction of a patent the court will read a specification so as to support it. *Beard v. Egerton*, 326

PLEADING.

To a complaint on two promissory notes, the defendant answered that the plaintiffs agreed to wait for payment until defendant could sell a quantity of lamps, &c., and appropriate the proceeds towards the payment thereof. Plaintiffs replied, denying that they agreed to wait, &c.; the cause was noticed for trial with a supplemental notice of motion for judgment on the ground of the frivolousness of the answer: *Held*, that the issue made by the answer was immaterial, and that plaintiffs were entitled to judgment. *Held*, also, that it was immaterial

that the plaintiff had replied to defendant's answer, because as the pleadings in the cause stood, no evidence that the defendant could offer on the trial would entitle him to judgment. *Stokes and others v. Hagar*, 16

In a complaint on a promissory note against the endorser, the plaintiff omitted to aver that the note was duly protested, so as to charge the endorser: *Held*, on demurrer, that the complaint was defective. *Turner v. Comstock*, 23

Trover for household furniture. Pleas, first, not guilty; second, that plaintiff was not possessed. It appeared that plaintiff was indebted to defendant, and that the wife of plaintiff, in his absence, gave the furniture to defendant in payment of his debt, and that he then took it away: the jury found that the wife had sufficient authority to do so: *Held*, that defendant was entitled to a verdict upon both issues.

Semble, that evidence of leave and license is receivable under the plea of not guilty. *Bingham v. Clements*, 29

Old pleadings subject to rules of Code. *MacCormick v. Graves*, 45

Covenant on a bill of sale of a steamboat which was sold free from incumbrances. It appeared that after the sale several bills for wharfage, &c. were presented to plaintiff, and that, under a threat of seizure, the plaintiff paid \$114 13. The complainant set out the agreement and facts, and alleged that the bills for wharfage were liens by which the vessel could be seized by attachment or by warrant of distress. Demurrer on the ground that no breaches of covenant had been assigned, and that by the law of this state a distress could only be levied on goods, &c.

Held, that the complainant showed a good cause of action; that any claim for which the vessel might be seized, might be treated as a cause of damage. That the plaintiff using the phraseology "warrant of distress," was immaterial, and might be treated as surplusage. Judgment for plaintiff, with costs. *Sisson v. Stevenson*, 255

POLICY OF INSURANCE.

Where the master of a ship has elected to repair a ship, and the freight has been brought home, the owners cannot recover on a policy of insurance, either for a total or a partial loss, although the repairs exceed the value of the ship and freight. *Benson v. Chapman*, 321

POWERS.

Power of sale, where the grantees of such power have authority to make such partition as they deem best, is not an imperative power, or an out and out conversion.

Though a power to sell for the purpose of distribution be an entire conversion, yet if one

of the distributees dies before actual conversion, and the grantees of the power are trustees for his heir, not his personal representatives. *In the matter of the account of Peter Vandervoort, Ex'r of, &c.* 25

PRINCIPAL AND AGENT.

Where the clerk of a house-agent signed a qualified agreement for a lease of a house, but there was no evidence of his authority: *Held*, that the court could not enforce it. *Lucas v. James*, 196

Where a provisional committee-man authorized eight persons to act on his behalf as a managing committee: *Held*, that he was not bound by a contract entered into by a smaller number. *Brown v. Andrew*, 197

PRINCIPAL AND SURETY.

M. sold to T. a quantity of corn, for which B., a broker, who effected the sale, became security. The corn was delivered by M. to D. and S., who purchased from T. T. having failed to pay M., B. the surety, paid part of the consideration to M., and a notice was served on D. and S. a few days afterwards that the contract was rescinded for fraud in not paying cash for the corn. In an action brought in the name of M., but for the benefit of B., to recover the corn from D. and S. and T.: *Held*, that such action could not be sustained. *Manning v. Dayton and others*, 21

PROMISSORY NOTE.

A defective and insufficient notice of protest may be aided, and helped out by accessory facts.

The question whether an endorser of a promissory note has been duly charged as such does not depend on the fact whether the note was correctly described in the notice of protest, but on the mind and knowledge of the endorser. It seems that any notice of protest, however defective, will be held sufficient, if, when taken in connection with accessory facts, it conveys to the mind of the endorser, information of the identical note intended to be protested.

It seems also that a notice of protest may vary according to each particular case, or the education, intelligence or quickness of comprehension of the endorser, as its sufficiency depends upon the information which it conveys to his mind.

A notice of protest need not show that a demand of payment of the note has been made; that is matter of evidence, to be given at the trial.

A notice of protest, describing a joint endorsement, as an individual one, is sufficient to charge the joint endorsers of a promissory note. *The Cayuga County Bank v. Warnden and Griswold*, 114

A notice to the endorser of a promissory note must be sufficient on its face to charge him as the endorser, and cannot be aided or helped out by extrinsic facts.

Such notice must, in such language as the holder may choose to adopt, inform the endorser of the fact that the note has been duly presented for payment, and that the maker has refused or neglected to pay it. *Dole, in Error, v. Gold, in Error,* 247

REMITTITUR.

A remittitur cannot regularly be sent to the court below until after the expiration of ten days from the reversal of the judgment, although rendered by default. *Syme v. Ward,* 10

RESTRAINT OF TRADE.

A covenant not to practise as surgeon and apothecary within seven miles will be enforced, although the employment of the defendant as an assistant had ceased: and the penalty must be paid as liquidated damages. *Sainter v. Ferguson,* 198

SALE OF GOODS.

An actual change of possession, in the 5th sec., title 2, of the statute of frauds, (2 R. S. p. 106,) means an open, visible, and public change.

The change must be of such a nature as to exclude the hazard of the debtor's deriving a false credit from the continuance of his apparent ownership.

The presumption of fraud which the statute raises from the continued possession by the debtor of goods alleged to have been sold, must be rebutted by evidence on the part of the vendee; and when no such evidence is given, the question of fraudulent intent ought not to be submitted to the jury.

The 5th sec., tit. 2, and the 4th sec., tit. 2, of the statute, must be so construed as to render them consistent with each other; but the latter would operate as a repeal of the former, if the question of fraudulent intent must be submitted to the uncontrolled discretion of the jury, when no evidence to rebut the statutory presumption has been given.

The statutory presumption is not rebutted merely by proof that the sale of goods, of which the debtor retained the possession, was founded on a valuable consideration, since a sale intended to be valid as between the parties, may yet be made with the intent of defrauding creditors.

The decisions of the Supreme Court, in *Collins v. Brush*, *Doane v. Eddy*, and *Randall v. Cooke*, which followed the rule in *Twyne's case*, have not been overruled by the decisions in the Court of Errors, in *Smith v. Acker*, *Cole v. White*, and *Hanford v. Aitcher*. *Randal v. Parker,* 333

VOL. VII.

51

SALVAGE.

The Admiralty Courts of the United States have jurisdiction over a claim of pilots for salvage and for the recovery of pilotage.

Pilots are under no legal obligation to go on board or take charge of a vessel, unless she is in a condition to require the services of a pilot strictly as such.

The court has jurisdiction over claims for salvage services when the same are performed on waters within ebb and flow of the tide within the territorial limits of a state. *Hyer and others v. the Schooner Wave,* 97

SEAMEN'S WAGES.

When a vessel is let to the master to be employed by him, and he to pay to the owners a certain portion of her earnings, the owners will be liable to the seamen for their wages, though by the agreement the master is to have the entire control of the vessel—to victual and man, and furnish supplies at his own expense, unless at the time of shipping, this contract is made known to them, and they are informed that they are to look to the master as the only owner.

The money that is paid over by the master, is paid as freight, and the owners as receivers, and having an interest in the freight, are liable to seamen for the wages.

The freight is hypothecated for the wages, and every part of the freight is liable for the whole wages. The owners who have received freight under such a contract with the master, are liable for wages to the full amount of the freight in their hands, and not merely *pro rata* in proportion to what they have received.

The merchandise is bound to the ship for the freight, and the freight to the seamen for their wages.

When the owners of the ship are also the owners of the cargo, the cargo owes freight to the ship, and this freight is pledged for the wages.

The decision in the case of *Poland v. The Spartan*, reviewed and affirmed. *Skotfeld, libellant, v. Potter,* 238

SEIZIN.

The peculiar interest which a purchaser acquires, before conveyance, in land sold under an execution, is not equivalent to seizin, and where a purchaser died before the expiration of the time within which the judgment debtor had the right to redeem, and the sheriff after the time for redemption had expired, conveyed to the administrators of the deceased purchaser for the benefit of heirs—*Held*, that such purchaser was not seized of the premises at the time of his death. Nature of seizin—conveyance by sheriff—escheat—trustees—inquest of office—title vested in the State—failure of heirs—

office found—right of the State to make grant of land of which owner died seized before office found—the restraining statutes of 8 Hen. 6, c. 16, and 18 Hen. 6, c. 6. Right of State to make grants, &c. &c., *Englishes v. Helmuth and Jenkins*, 186

SET-OFF

In an action for the standing of a horse at livery, the defendant sought to set-off as money received to his use the price paid for the horse, by a person to whom the plaintiff had sold him. It appeared that the sale was effected by fraud, a false warranty having been given that the horse was free from vice, and that on the purchaser discovering the deceit, he rescinded the contract, returned the horse and received back the money:—*Held*, First, that the set-off could not be maintained as the defendant's right to the price of the horse as money received to his use, arose from the contract of sale, and on that being rescinded, his right to the money was gone.

Secondly, that the plaintiff, availing himself of the above facts to rebut the set-off, was not a violation of the rule of law which prohibits a party from setting up his own fraud. *Murray v. Mann*, 62

Notice of assignment of judgment or cause of action personally to the debtor is essential to protect it in the hands of a *bona fide* assignee, against the off-set of a subsequent judgment between the same parties. The lien of the attorney for costs is not recognised on a motion to set-off judgments. *Keitchum v. Williams*, 181

A debt due from a factor cannot be set-off by a purchaser of goods from the factor, where such purchaser had notice of the sale being made as agent, though the name of the principal was not stated. *Fish v. Kempton*, 232

SLANDER.

Held, that an action for slander will not lie by a servant against a former master, where the words spoken have not been spoken maliciously, and the circumstances so stated only came to the master's knowledge after the character had been given; and held also, that it was immaterial, whether the communication was made at the time of giving the character or some time afterwards. *Gardner v. Slade*, 376

SPECIFIC PERFORMANCE.

Where, in a bill for specific performance, it appeared that H. assigned to W. the government contract for the Panama and Oregon mail, previous to assignment to A.—*Held*, on demurrer, that unless it appeared that the government had assented to such assignment, the court could not enforce such a contract. *Woodward v. Harris and another*, 365

STATUTE OF FRAUDS.

A ship-broker entered into an agreement with certain ship-owners to procure a vessel to be chartered in consideration of his commission, and he was to pay the same out of the receipts of the freight. Some change took place in the owners, and on the return of the vessel they promised, not however in writing, to pay the commission on his foregoing his claim to collect the freight: *Held*, that under the statute of frauds, the promise should have been in writing, as being an agreement to pay the debt of a third party. *Gall v. Lindsey*, 355

STATUTE OF LIMITATIONS.

A plea is not rendered double by an express averment of facts which, without such an averment, would be implied.

An averment to render a plea double, must set up a separate defence.

To prevent the statute of limitations from commencing to run, it is not necessary to aver that the defendant resided out of the state when the cause of action accrued. It is sufficient that the defendant, at that time, was out of the state. The statute applies both to residents and non-residents.

Nor in order to set the statute in motion by the return of an absent defendant, is it necessary to show or aver that he resided within the state after his return. The fact of a return is sufficient.

In pleading the statute, the defendant is not bound to negative the exceptions created by the second clause, section 27. It lies upon the plaintiff to aver and prove the facts that create an exception from the general rule that the statute establishes.

In a plea that six years had elapsed since the return of the defendant, it is not necessary to aver that his return was public and notorious, so that the plaintiff, with due diligence, might have caused him to be arrested, for these facts are implied in the allegation of a return, and in order to sustain the plea, must be proved upon the trial.

The safest and best mode of pleading a defence founded upon a statute, is to follow the words of the law, since the same construction must be given to the words in the plea as in the statute.

Cole v. Jessup, (2 Barbour's Sup. Court Reports, p. 309,) is inconsistent with all the other cases, and its authority therefore denied.

The Superior Court, as now constituted, is not bound by the decisions of the present Supreme Court. It is now a co-ordinate, not a subordinate tribunal.

The new exception created by the second clause, sec. 27, of the statute of limitations, is not confined to residents in the state. It embraces non-residents as well as residents; nor is it only the first period of the absence of a defendant that is to be deducted from

the term of limitation that the statute allows. Successive absences must be accumulated and deducted.

The intention of the legislature was to abolish the former rule, that "where the term of limitation had begun to run, it continues to run without suspense or intermission until its expiration," in all cases to which it applies. Hence, to create a bar under the present statute, it must appear that the defendant was six years within the state, deducting each period of absence, after the cause of action accrued.

The decisions on this branch of the statute are various and contradictory. *Ford v. Babcock*, 270

SURETY.

A surety who has paid money for which he is not legally liable, in ignorance of facts, may recover it back in an action for money had and received. *Mills v. The Guardians of the Alderbury Union*, 355

SURROGATE'S COURT.

Where real estate, subject to a power of sale by executors, has been sold under a decree of a court of Chancery, and the proceeds paid over to the heirs by order of that court, the executors cannot be made accountable in a Surrogate's Court for such proceeds.

Where there is a trust created by will of the rents of real estate, for the benefit of a family, while "they continue such," and there is no similar trust of the proceeds of the sale of such lands, under a power contained in such will, such power, though not limited in terms, cannot be exercised until the family has broken up.

Distinction between legal and equitable assets considered; lands ordered to be sold by will are legal, those authorized to be sold are equitable assets. The Surrogate's Court has only jurisdiction to compel an account in case of the former, where there is an "out and out" conversion. *In the matter of the account of Peter Vandervoort, Executor, &c.* 25

The power to enforce final orders or decrees in a Surrogate's Court is confined to cases where the party is ordered to transfer or hand over specific property in his actual possession or under his control.

Where, however, a final order or decree of a surrogate settles the accounts of a guardian, executor or administrator, and decrees an indebtedness to a ward, legatee, or next of kin, there is no power in the surrogate to commit as for a contempt, by reason of the nonpayment of the indebtedness. The creditor's only recourse is by execution as upon a judgment, and that failing he may then take an assignment of the guardian or administrator's bond on file in the surrogate's office.

Informality of commitment pointed out and

commented on. *In the matter of John Seaman*, 70

Though an account in a specified form cannot be compelled in a Surrogate's Court, yet a statement which does not clearly present the results upon points in reference to which the decree is final, must be looked on with suspicion as to their fairness.

The admission into an accounting by an administrator of a sum as the proceeds of land sold by him, and the distribution of the amount found due by such accounting by a final decree therein to the heir at law, would operate as an estoppel against the latter to deny the validity of the sale. The power of an executor at common law is confined to the personal estate, and is adhered to in all the statutes of this state.

Legal assets are subject to preferences among creditors. Equitable assets are distributable equally; and this distinction is carried out in statutory provisions for the distribution of proceeds of lands in the hands of an executor, by authority of a surrogate.

Express authority, by separate legislative provisions, was deemed necessary to be given to the surrogate to exercise any jurisdiction over the proceeds of lands sold under authority of a last will.

Any provision conferring additional powers upon an administrator, contrary to the general scope of a statute, must be strictly construed.

The exercise of the right by a surrogate to appoint a trustee to sell lands, would be mischievous in various particulars. 1st. As to the limitation of the persons to be appointed. 2d. Omitting notice of the application to interested parties. 3d. Dispensing with proof of the will as one of real estate. 4th. As to the security to be taken. 5th. As to his accounting.

Such right would clash with the powers of the Court of Chancery in relation to trustees.

The doctrine of an executor's powers, as executor, beyond those over personal estate, only applicable to three cases. 1st. When no trustee to sell is named, and the proceeds of land sold are to pay debts and legacies. 2d. The provision (2 R. S. 109, § 55) permitting a sale by those executors only who have proved a will. 3d. The survivorship of a naked power to sell in a will.

Statute giving to administrators with the will annexed—power of executors traced.

Where an executor is removed by a surrogate, the person succeeding to the administration of the estate is not chargeable with moneys collected by the former, or the value of chattels to whose use a legatee is entitled for life by the will. *In the matter of accounting of Nelson Place, Adm'r, &c. of Adamson*, 217

TENDER.

Evidence that a debtor tendered, in discharge

of a claim, comprising several items, a sum in gross less than the whole sum claimed, without specifying to which items it was to be applied, does not prove a tender in discharge of a particular item. *Hardingham v. Allen*, 31

TRADE MARKS.

Injunction granted restraining the defendant from using labels, cards, handbills, &c., which were used for the purpose of leading the public to believe that the manufacture to which they related was made by the plaintiff *Onyon v. Washbourn*, 229

The jurisdiction that courts of equity now exercise in relation to trade marks, is of recent origin.

It is, however, firmly established, and upon just and rational grounds.

Every manufacturer, &c., has an unquestionable right to distinguish his goods by a particular mark or device, that they may be known as his in the market, and that he may thus secure the profits that their superior quality may be the means of gaining.

In the exercise of this right, he is entitled to the protection of the law, and the interests of the public as well as of the individual require that this protection should be given to him.

He who affixes to his own goods a copy or imitation of the trade mark of another, commits a fraud upon the public and upon the owner of the original mark.

Purchasers are deceived by having imposed upon them an article they never meant to buy.

The owner is robbed of the fruits of the reputation he had justly earned.

In the case of the owner there is a fraud coupled with damage, and the injury to him may be such as not to admit a compensation in damages. If not restrained it may be irreparable.

The right and duty of a court of equity to restrain the wrong-doer by injunction, therefore, rests upon these grounds:—1. The protection of a party in the exercise of a legal right. 2. The suppression of fraud. 3. The prevention of irreparable mischief.

The power of granting an injunction is, however, to be exercised with great caution. The interests of the public and the rights of individuals, prescribe certain limits that must not be transgressed.

It is not to be exercised where the legal right is disputed and is doubtful, nor so as to create or incur the hazard of creating a monopoly.

The essence of the wrong which is to be restrained and punished, consists, in all cases, in the sale of the goods of one person as those of another.

Hence, it is only when this false representation is directly or indirectly made, and only to the extent in which it is made, that an injunction should be granted.

The owner of the original mark is to be protected in the exclusive use of all such signs, symbols, &c., as indicate the true origin or ownership of the goods, but not of such as only designate their name or quality.

To justify the interference of the court, it is not necessary that the resemblance between trade marks should be entire and perfect. It is sufficient that the intent of misleading the public as to the ownership of the goods is apparent, and this is conclusive when the evidence shows that the public had been in fact misled.

In the application of the principles stated to the facts of the case, it was held that the general resemblance of the trade mark adopted by the defendants to the original trade mark of the plaintiffs, was such as to render it proper and necessary to continue the injunction—the imitation was designed and elaborate. It was calculated to mislead the public, and it was proved that many purchasers had been in fact misled.

But it was also held, that the letters A. C. A. upon the trade mark of the plaintiffs were not an indication of ownership, but were only used to designate the relative quality of the goods, and hence that the defendants could not be restrained from using them for the same purpose.

The injunction was modified accordingly. *The Amoskeag Manufacturing Co. against I. S. and R.* 30

TRESPASS.

One tenant in common can maintain an action of trespass against another tenant in common.

Trespass will lie where ejectment can be maintained. *Murray v. Hall*, 232

TRUSTS.

Where a testator by a will made in 1815, devised his real estate to his three grandchildren, directing that it should not be sold or alienated, but that his executors should from time to time lease or rent it, on such terms and for such rent as they might deem most advantageous to his heirs, keep certain portions of it in repair, and pay the rents and profits annually to the heirs, in equal proportions, held an active trust, and that the executors took the legal estate during the lives of the grandchildren.

The duty imposed by such a will upon executors is not a mere leasing power. When something is to be done by them which makes it necessary that they should have the legal estate, such as the payment of rents and profits over to another's separate use or any power of management, they take the legal estate.

The absence of express words of devise is not material. If it be necessary that the trustees should have the legal estate, they take it by implication of law.

A release or conveyance from trustees to a *cestui que trust* will not be presumed, though the *cestui que trust* has been in possession, and the trustees have ceased to act for many years. It will not be presumed that an act was done which would be a breach of the trust, or be contrary to the duties of the trustees. *Brewster v. Striker*, 140

UNITED STATES MARSHAL.

The marshal is immediately responsible for moneys coming properly in the course of official duty into the hands of his deputy.

Independent of statutory provisions, the courts of the United States have an inherent right and power to regulate their own process, and the disposition of moneys obtained under their process or order, and to compel observance of their rules by attachment.

The deputy marshal is an officer of this court, and subject to attachment for contempt by summary order.

The resignation of office by a deputy marshal affects only the powers of the court over his executory acts; even his removal from office by order of the court, would not exempt him from liability for past contempt.

Specie in foreign coin, is not merely cargo, but money, and to be paid into court as such.

Depositing money into bank to the credit of the court, is paying money into court according to the Act of Congress, 1817.

Though strict formality in the proceedings is necessary to entitle to a peremptory order, yet if the affidavit of party proceeded against satisfies the court of his contumacy an order of attachment will be granted against him.

The marshal is answerable for acts of his deputy done "*colore officii*," although without his knowledge, and in the case of moneys received belonging to suitors, process of attachment may be had against the marshal personally.

If a deputy obtain possession of money belonging to suitors tortuously, and in fraud of the marshal's rights, the marshal is not amenable to summary process of attachment therefor.

To entitle a party to a peremptory attachment the applicant must show that the preliminary proceedings have been strictly correct. Same rigor, however, not necessary to bring a party in court to answer matters touching a civil suit.

The practice of the state court governs in this court when not otherwise regulated by the specific rules of this court.

Under the Act of Congress of March 3d, 1817, a deputy marshal is subject to the same summary remedy in respect to moneys held by him officially that the marshal is.

The Act of 3d of March, 1817, applies to every grade of officers carrying into execution the powers of the court, and receiving moneys under their process or by their direction. *The United States v. The Brig Lawrence*, 174

WILL.

Undue influence—diminution of mental power at the time of execution of will—proof—confidential relation between testator and legatee, &c., &c. *In the matter of proving the will of Mary Welch*, 153

The general object and scope of a will are to be considered in giving it a construction; and any incongruity between the different parts of a will must be reconciled, if it can be done without doing violence to any expressions of the will.

If a sale of the whole realty for the purpose of fully and fairly executing the trust is necessary, the particular time at or manner in which this is directed by the will to be done, is unimportant; a reasonable time in such cases is intended, and courts of equity will see that the rights and interests of beneficiaries are not prejudiced by unreasonable delay.

Where executors and trustees under a will have implied permission to allow one third of the real estate to remain unsold, during the life of the widow, with the right to lease and insure property, and to exchange lands, &c., this does not invalidate or prejudice their right and duty to dispose of and convert into money, all the testator's real estate, which by the provisions of the will they must necessarily do, in order to comply with the direction for payment of legacies.

Beneficiaries under a will, take the gift in the character which the testator chooses to impart to it.

Money, given by will to be laid out in land, vests as land.

Land, devised to be sold and the proceeds paid over, passes and vests as personality.

Whatever in a will is directed to be done, is in equity considered as done.

An obligation to sell, express or implied, if imperative, though the time and manner of sale may be discretionary with the executors, will be considered as made, so far as the beneficiaries are concerned.

A general power in trust, imposes a duty upon the trustee, which equity will compel him to perform.

Trusts created for the benefit of creditors and legatees, &c., when void. *Arnold and others v. Gilbert and others*, 209

Where a testatrix had excluded from the bequest her daughter's eldest son, or such of her sons as by the death of an elder brother might become the elder son, the death of the eldest son after the testatrix did not affect the bequest, and the second son becoming the eldest before the youngest attained twenty-one, was excluded. *Livesey v. Livesey*, 260

A testator gave certain sums of money to his daughter for life, with remainder to her children on attaining twenty-one or marriage; the children attained twenty-one but died before the daughter: Held, that they took vested interests. *Attorney-General v. Wilsheer*, 323

WITNESS.

It is not collateral but relevant to the main issue to inquire into the motives which influence a witness in giving his testimony.

A sufficient foundation is laid for such contradiction if the attention of the witness has been directed to the time, place and circumstances attending an alleged statement made by him, and the name of the person to whom he may have made it, need not be mentioned, if it was not necessary to enable him to know to what remark his attention was directed.

The statute allowing the relative of a person killed, to recover damages therefor, it will be no impeachment of a witness, that he as a father of the deceased had attempted by negotiation to recover compensation from the author of the death. *The People v. Austin*, 117

WRIT OF ERROR.

Upon writ of error from the Court of Queen's Bench, Ireland—*Held*, 1st. That the statement in the caption that the commission

had been executed by three commissioners, was not made uncertain by the further statement that the commission included others besides the three judges. 2d. That the plaintiffs in error were not entitled to a copy of the indictment and list of witnesses as of right—the 36 G. 3, c. 7, not extending to Ireland. 3d. That the levying war, &c., in Ireland, was treason under the 25 Edw. 3, c. 2, which was extended to Ireland by Poyning's acts. 4th. That the omission of the words "of death," in the allocutus, why the court should not pronounce judgment, was immaterial. *O'Brien v. Reginam*, 258

WRIT OF NE EXEAT.

The writ of *ne exeat*, or equitable bail, is abolished by the code of procedure.

Arrest and bail, as provisional remedies in civil actions of an equitable nature, can be obtained only in the cases, and in the manner prescribed by the code. *Fuller v. Emeric*, 300

AN
INDEX
TO THE
PRINCIPAL MATTERS
IN THIS VOLUME.

[For Digest of the Reports, see p. 377.]

ARTICLES—

On challenging jurors. Art. I. Opinion of Judge Ogden Edwards upon the question whether having an opinion, or even expressing it, that a person is guilty, legally disqualifies from serving as a juror, 1.

Art. II, 33.

On construction, No. 1, 85.

“ “ “ 2, 201.

On reclamation of fugitive slaves, 128.

On liability of endorers, 169.

On the contract of endorsement, 233.

On immaterial variances, 264.

On trade marks, 269.

On Promissory note—notice of dishonor—how and for what, 296

PRACTICAL POINTS—

Bill of exchange—acceptance by married woman for husband in her own name, 137.

Alien—British subject born in America, 168.

Patent—wording of title, 208.

Bill of Exchange—estoppel, 216.

Trade marks—injunction, 224.

Mischievous animal, 292.

Bill of exchange—Note of dishonor, 299.

Carrier—loss of parcel—evidence, *ib.*

Marine insurance—total loss, 320.

Libel—pleading, *ib.*

Contract—Post letter—damages, 328.

Married women—reversionary interest—merger, 330.

CRIMINAL LAW—

Finding a chattel, 137.

OBITUARY—

David B. Ogden, 264.

The Hon. John L. Lawrence, *ib.*

Sir Thomas Coltman, 296.

ORIGINAL LETTERS—

From John Sloss Hobart to the Hon. Z. Platt, No. 1, 329.

REVIEW—

Duer on Marine Insurance, 261.

Smith's Commentaries on statute and constitutional law, 292.

Coppinger on the usury laws, 352.

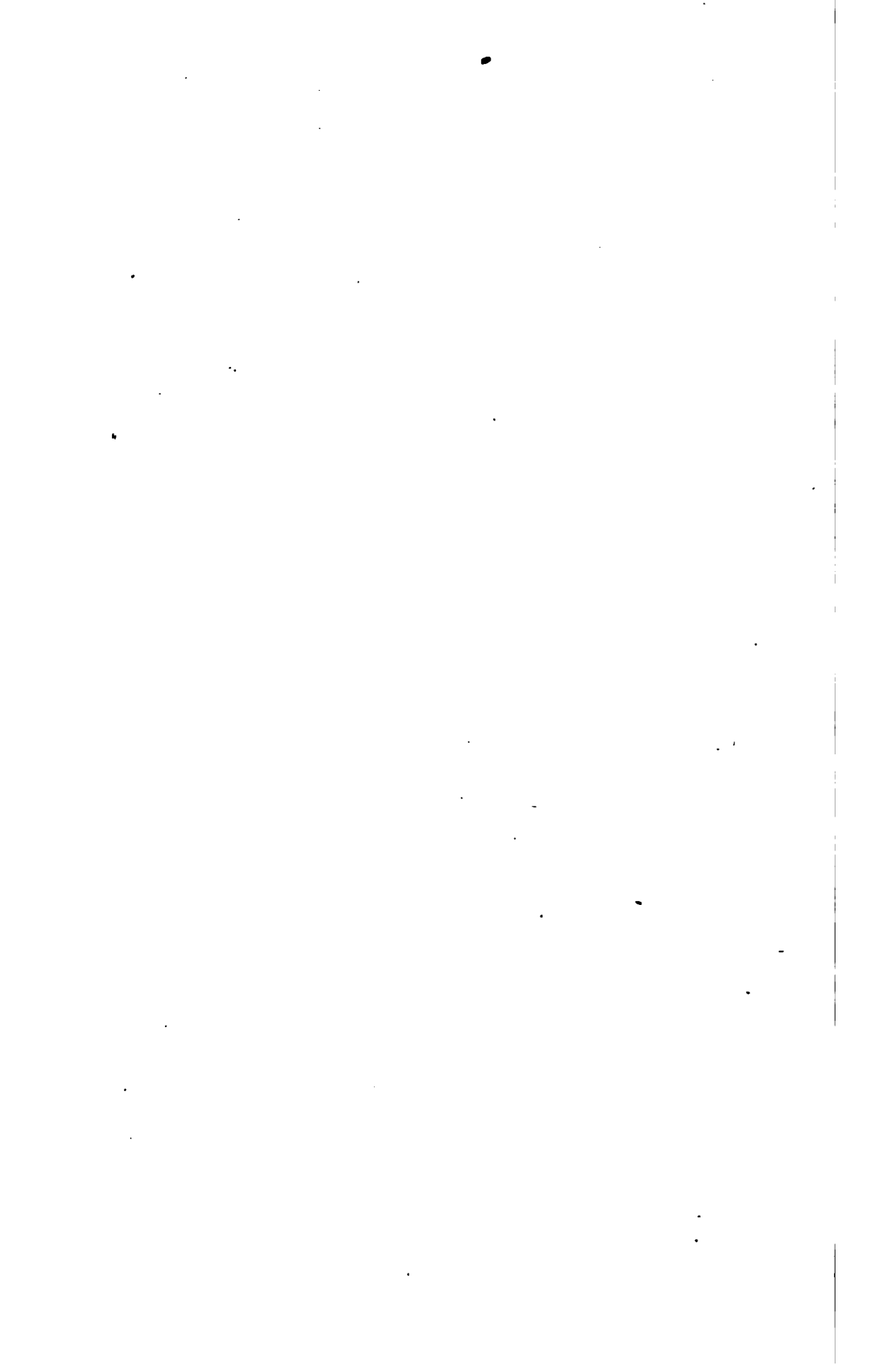
Monell's treatise on the practice of the courts of the state of New-York, adapted to the code of procedure.

RULES—

New Rules—Superior Court, 200.

Of the Common Pleas, 217.

With reference to hearing appeals from Marine Court and the Justices' Courts, 22





Stanford Law Library



3 6105 063 061 712

